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Nos. 90-29, 90-38 (9) (11)

In the

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, *et. al.*
RESPONDENTS
and
DANIEL L. MEDLOCK, *et. al.*
PETITIONERS
v.
JAMES C. PLEDGER, *et. al.*
RESPONDENTS

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

JOINT APPENDIX

WILLIAM E. KEADLE
No. 83099
Revenue Legal Counsel
Arkansas Department of
Finance and Administration
Seventh and Wolfe Streets
P.O. Box 1272-L
Little Rock, AR 72203
(501) 682-7030

Counsel of Record for
Petitioners in
Docket No. 90-29 and
Respondent Pledger in
Docket
No. 90-38

EUGENE G. SAYRE
No. 75111
Jack, Lyon & Jones, P.A.
425 West Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201
(501) 375-1122

Counsel of Record for
Petitioners in
Docket No. 90-38 and for
Respondents Docket
No. 90-29

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Pulaski County, Arkansas, Chancery Court

DATE	PROCEEDINGS
	• • • •
1987	
July 16	[Plaintiffs'] Second Amended Complaint (with exhibit)
July 29	Defendant Ragland's [Commissioner of Revenues'] Answer to Second Amended Complaint
Aug. 4	Defendant Ragland's [Commissioner of Revenues'] Counterclaim
Aug. 4	Defendant Fisher's Answer to Second Amended Complaint
Aug. 5	Pulaski County Defendants' Answer to Second Amended Complaint
Aug. 14	Plaintiffs' Answer to Defendant Ragland's Counterclaim
Aug. 28	Order on Pending Motions [following hearing on Plaintiffs' Preliminary Injunction Motion]
Aug. 28	Preliminary Injunction [creating escrow account]
Aug. 28	Order for Certification as Class Action
Nov. 9	Defendant Pledger's Supplement to Answer to Second Amended Complaint

DATE	PROCEEDINGS
1988	
May 2	Plaintiffs' Motion to Strike Defendant Pledger's Supplement to Answer Second Amended Complaint, or, Alternatively, to Deny Allegations for Declaratory Judgment
May 4	Motion to Intervene by City of Fayetteville, Arkansas (with proposed Answer attached as Exhibit C)
May 9	Order Allowing Intervention by City of Fayetteville, Arkansas
1989	
	Opinion [by Pulaski County Chancery Court]
Mar. 13	Order and Judgment [releasing amount in escrow account]
Mar. 21	Order Denying Motion for Stay of Order Rescinding Preliminary Injunction [Escrow Account]
Mar. 23	Supplemental Notice of Appeal [Arkansas Supreme Court]
1990	
Feb. 28	Opinion by Arkansas Supreme Court
Mar. 16	Commissioner of Revenues' Petition for Rehearing
Mar. 20	ACTA and Taxpayers' Petition for Rehearing
Mar. 26	ACTA and Taxpayers' Response to Appellees' Petition for Rehearing

DATE	PROCEEDINGS
Mar. 28	Appellees' Response to Appellant's Petition for Rehearing
Apr. 2	Order of Arkansas Supreme Court denying Petitions for Rehearing
July 2	Petition for Certiorari filed in Docket No. 90-29
July 2	Petition for Certiorari filed in Docket No. 90-38
Oct. 1	Order Granting Petitions for Certiorari in Docket Nos. 90-29 and 90-38 and Consolidating Cases

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

CHARLES D. RAGLAND, Commissioner of Revenues; JIMMIE LOU FISHER, Treasurer of the State of Arkansas; DONALD VENHAUS, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; THE ARKANSAS ASSOCIATION OF COUNTIES; JOANN BOONE, Treasurer, City of Benton, Arkansas; THE CITY OF BENTON, ARKANSAS; THE ARKANSAS MUNICIPAL LEAGUE, and all other similarly situated counties and cities — DEFENDANTS

SECOND AMENDED COMPLAINT
(Filed July 16, 1987)

Come now the Plaintiffs, individually and as representatives of the class of similarly situated taxpayers, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, and for their cause of action against Charles D. Ragland, Commissioner of Revenues; Jimmie Lou Fisher, Treasurer of the State of Arkansas; Donald Venhaus, County Judge, Pulaski County, Arkansas; Patricia Tedford, Treasurer, Pulaski County, Arkansas; The Arkansas

Association of Counties; Joann Boone, Treasurer, City of Benton, Arkansas; The City of Benton, Arkansas; The Arkansas Municipal League, individually and as representative of a class of similarly situated counties and cities, as Defendants, do hereby allege and state as follows:

PLAINTIFFS

1. Plaintiff, Daniel L. Medlock, is an individual, a taxpayer, a subscriber to cable television services, and a citizen of the City of Little Rock, Pulaski County, Arkansas.

2. Plaintiff, Community Communications Company, is a corporation organized and existing under the laws of the State of Arkansas, with its principal office located in Drew County, Arkanas. Community Communications Company owns and operates a cable television system in the State of Arkansas which provides cable television services that will be illegally subjected to the Arkansas Gross Receipts Tax and various local Gross Receipts Taxes.

3. Plaintiff, Arkansas Cable Television Association, Inc., is a not-for-profit corporation that is a trade organization representing over 100 providers of cable television service within the State of Arkansas, with its principal office located in the City of Little Rock, Pulaski County, Arkansas.

DEFENDANTS

4. Defendant, Charles D. Ragland, is the duly appointed and acting Commissioner of Revenues for the State of Arkansas, and the individual charged with collecting and enforcing both the state and local Gross Receipts Taxes imposed under the laws of the State of Arkansas.

5. Defendant, Jimmie Lou Fisher, is the duly elected and acting Treasurer of the State of Arkansas, and is the official charged with accounting for and distributing both the

state and local Gross Receipts Taxes to the General Treasury of the State of Arkansas and to the respective county and municipal governmental entities throughout the State of Arkansas, where a local Gross Receipts Tax will be imposed upon cable television services because of the provisions of Act 188 of 1987.

6. Defendant, Donald Venhaus, is the duly elected and acting County Judge for Pulaski County, Arkansas. Defendant, Patricia Tedford, is the duly elected and acting Treasurer of Pulaski County, Arkansas. Defendant, Pulaski County, Arkansas, is a political subdivision of the State of Arkansas that has been validly created pursuant to law.

7. Defendant, Arkansas Association of Counties is a not-for-profit organization created under the laws of the State of Arkansas for the purpose of representing the interests of all of the respective county governments in the State of Arkansas, all of which counties are members of this Association. The principal office and place of business of this Association is located in the City of Little Rock, Pulaski County, Arkansas.

8. Defendant, Joann Boone, is the Treasurer, chief fiscal officer and disbursing agent for the City of Benton, Arkansas. Defendant the City of Benton, Arkansas, is an existing municipal corporation that has been validly created pursuant to law.

9. The Arkansas Municipal League is a not-for-profit organization created under the laws of the State of Arkansas of which the majority of the municipal corporations organized in the State of Arkansas are active dues paying members. The principal office and place of business of the Arkansas Municipal League is located in the City of Little Rock, Pulaski County, Arkansas.

GENERAL CAUSE OF ACTION

10. This is an action to enjoin, as an illegal exaction, the collection, from the Plaintiffs and all other similarly situated taxpayers, of the 4% Gross Receipts Tax imposed by the State of Arkansas and the 1% local Gross Receipts Taxes imposed by Pulaski County, Arkansas, the Cityof Benton, Arkansas, and all other similarly situated counties and municipal corporations in the State of Arkansas that impose a 1% local Gross Receipts Tax upon cable television services in violation of the Plaintiffs' constitutional right to free speech: to enjoin the appropriation and expenditure of the funds generated by these illegal levies; to order an escrowing of the tax monies collected during the pendency of this action; and to order an accounting and refund to the Plaintiffs and all similarly situated taxpayers of the amounts of the illegally exacted state and local Gross Receipts Taxes that may be collected by Defendant Ragland on or after July 1, 1987, pursuant to the provisions of Act 188 of 1987, plus interest as provided by law, less the cost of administration and the award of an attorney's fee.

JURISDICTION

11. This Court's jurisdiction is founded upon Article 16, § 13, of the Constitution of the State of Arkansas. Alternatively, this Court has jurisdiction of this action under the provisions of 42 U.S.C. § 1983 in that Act 188 of 1987 deprives the Plaintiffs of rights, privileges and immunities and the equal protection of the laws secured by the Constitution and laws of the United States of America and the Constitution of the State of Arkansas. Alternatively, this Court has jurisdiction of this action under the provisions of Ark. Stat. Ann. § 34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure, inasmuch as the implementation of Act 188 of 1987, as currently proposed by the Defendants, will illegally deprive the Plaintiffs and all similarly situated taxpayers of monies which they will not owe to the State of Arkansas and to the respective counties and cities that

impose a 1% local Gross Receipts Tax, and thus, a real case and controversy exists for determination of the parties' rights pursuant to a declaratory judgment.

CLASS ACTION

12. Plaintiffs bring this action on behalf of themselves and, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, all other cable television service providers and taxpayers who are similarly situated, to test the legality and constitutionality of the provisions of Act 188 of 1987, so as to protect the constitutional rights of all cable television service providers to free speech and to protect the affected class of taxpayers against the enforcement of illegal exactions that will be imposed because of this Act. The affected cable television service providers form a class of more than 100 and the affected taxpayers form a class in excess of 400,000 individual taxpaying subscribers to cable television services in the State of Arkansas that are similarly situated. Such class of Plaintiffs is so large that it is impractical to bring them all before this Court within a reasonable period of time. The certification of this action as a class action will avoid a multiplicity of possibly conflicting adjudications on the same issue. There are questions of law and fact presented herein which are common to the entire class of Plaintiff cable television service providers and taxpayers. The claims of the Plaintiffs herein are typical of the claims of the above-described class. Plaintiffs will fairly and adequately protect the interests of the entire class and prosecute this action for the benefit of all members of that class.

13. Defendants Donald Venhaus, Patricia Tedford, and Pulaski County are representative of a large number of Arkansas counties that have imposed a 1% local Gross Receipts Tax, pursuant to the provisions of either Act 991 of 1981, or Act 26 of 1981, First Extraordinary Session. Defendants, Joann Boone and the City of Benton, Arkansas, are representative of a large number of municipal

corporations in the State of Arkansas that have imposed a 1% local Gross Receipts Tax under the provisions of Act 4 of 1968, Act 990 of 1975, Act 48 of 1977, or Act 25 if 1981, First Extraordinary Session. Defendant, Association of Arkansas Counties is a not-for-profit corporation whose membership is composed of all of the counties in the State of Arkansas, including those counties in which a 1% local Gross Receipts Tax has been adopted. Defendant, Arkansas Municipal League, is a not-for-profit corporation, whose membership is composed of the majority of the municipal corporations in the State of Arkansas, including a number of municipal corporations that have either imposed a 1% or greater local Gross Receipts Tax themselves or are direct beneficiaries of a 1% local Gross Receipts Tax imposed by the county in which such municipal corporations exist. Plaintiffs bring this action against these named Defendants, individually and as representatives of all other counties and municipal corporations in the State of Arkansas that are similarly situated because such governmental entities will impose a 1% local Gross Receipts Tax upon cable television services. All of the counties and municipal corporations that impose a local Gross Receipts Tax form a class of Defendants in excess of 250 governmental entities that are similarly situated. Such class of Defendants is so large that it is impractical to bring them all before this Court within a reasonable period of time. The certification of this action as a class action will avoid a multiplicity of possibly conflicting adjudications on the same issue. There are questions of law and facts presented herein that are common to the entire class of Defendant governmental entities. The claims of the named Defendants herein are typical of the claims of all similarly situated counties or municipal corporations comprising the above-described class. The named county and municipal defendants, the representative organizations of such cities and counties, and the named State officials will fairly and adequately protect the interests of the entire class of county and municipal government defendants and will be able to defend against the prosecution of this action for the benefit of all members of the above-described class of defendants.

SPECIFIC CAUSES OF ACTION

14. This is an action (1) to have declared as an illegal exaction, under Article 16, § 13 of the Constitution of the State of Arkansas, the imposition and collection of both the Gross Receipts Tax imposed by (a) the State of Arkansas and (b) by various counties and municipal corporations existing within the State of Arkansas, pursuant to the provisions of Act 188 of 1987, on and from the Plaintiffs and all other similarly situated cable television service providers and taxpayers; (2) to place all Gross Receipts Tax monies subsequently collected by Defendant Charles D. Ragland under the provisions of Act 188 of 1987 in a special interest bearing account outside of the General Fund or designated Special Revenue Funds of the State of Arkansas, pending the outcome of this proceeding; (3) to order an accounting to the Plaintiffs and all other similarly situated taxpayers of the amounts of the illegally exacted Gross Receipts Taxes that will be collected pursuant to the provisions of Act 188 of 1987; and (4) to order a refund of such taxes, plus interest from the date of payment to the date of refund (less the costs of administration and the award of an attorney's fee), to each taxpayer-member of the Plaintiff-class. Plaintiffs also seek to have declared unconstitutional under both the United States Constitution and the Constitution of the State of Arkansas, the provisions of Act 188 of 1987 for the reasons set forth below.

15. On March 12, 1987, the Honorable Bill Clinton, Governor of the State of Arkansas, approved House Bill 1784 as passed by the 76th General Assembly of the State of Arkansas, said Bill then becoming Act 188 of 1987, the provisions of which are to become effective on and after July 1, 1987. A copy of Act 188 of 1987 is attached hereto as Exhibit A.

16. The Plaintiffs, on behalf of themselves and all other similarly situated cable television service providers and taxpayers, contend, and in this action seek to prove, that Act 188 of 1987 does both facially and actually:

(a) Single out cable television services upon which to impose Gross Receipts Taxes, which imposition of these taxes abridges the freedom of speech guaranteed the members of the Plaintiff-class by the provisions of the First and Fourteenth Amendment of the United States Constitution, because such Gross Receipts Taxes are not imposed upon other similarly situated instrumentalities of public communication, of either an electronic or print media, in the State of Arkansas;

(b) Selectively imposes upon the providers of cable television service a tax burden not shared by the providers of other forms or instrumentalities of public communication, either of an electronic or print media, in violation of the privileges and immunities clause of the United States Constitution, Article 4, § 2 and the privileges and immunities clause of Constitution of the State of Arkansas, Article 2, § 18.

(c) Deprives the providers of cable television services in the State of Arkansas the benefit of the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the United States Constitution and Article 2, § 3 of the Constitution of the State of Arkansas, since the state laws that impose both the state and local Gross Receipts Taxes in question discriminate in favor of other forms or instrumentalities of public communication, either of electronic or print media, by either specifically exempting or excluding such forms or instrumentalities of public communication from the state and local Gross Receipts Taxes imposed within the State of Arkansas, while illegally singling out cable television services upon which to impose such Gross Receipts Taxes.

(d) Causes Act 188 of 1987 to be incompatible and contrary to the Federal law on a subject matter in which the federal law standards preempt and preclude inconsistent state treatment and discriminatorily taxes cable television services in

violation of the supremacy clause of the United States Constitution, Article 6, § 2 and the provisions of § 542 of the Cable Communications Policy Act of 1984 (42 U.S.C. § 542).

17. The business of providing cable television services in the State of Arkansas, like that of newspapers and magazines, is to provide cable television service subscribers with a mixure of news, information and entertainment. As do newspapers and magazines, Community Communications Company and all other cable television service providers in the State of Arkansas use a portion of their available space to reprint (or re-transmit) the communications of others, while at the same time providing some original content and programming.

18. Community Communications Company and the other cable television service providers in the State of Arkansas exercise editorial discretion over which stations or programs to include in its programming repertoire. Community Communications Company and all other cable television service providers in the State of Arkansas seek to communicate messages on a wide variety of topics and a wide variety of formats, including public access channels and public announcements or electronic bulletin boards.

19. Like the activities of wireless television and radio broadcasters, satellite television broadcast companies, newspapers, magazines, book publishers, public speakers and pamphleteers, Community Communications Company and all other cable television service providers in the State of Arkansas are engaged in communication of ideas, expressions, philosophies, and news that are protected by the right of free speech guaranteed by the First Amendment to the United States Constitution.

ESCROWING OF MONIES

20. While this action is pending, Plaintiffs further state that Defendant Ragland will collect and continue to

collect both the state and local Gross Receipts Tax monies representing the Gross Receipts Taxes imposed because of the provisions of Act 188 of 1987. Until a judgment becomes final in this proceeding, Plaintiffs contend that the Defendants should be preliminarily and permanently enjoined, pursuant to the provisions of Rule 65 of the Arkansas Rules of Civil Procedure, from actually depositing any of these monies into the State Treasury or distributing any of the 1% local Gross Recepits Taxes generated because of Act 188 of 1987 to any of the counties or municipal corporations in which jurisdictions such local taxes are imposed. Further, Plaintiffs state that the Defendants should be preliminarily and permanently enjoined from expending any of the state or local Gross Receipts Tax moneys illegally exacted from them because of the provisions of Act 188 of 1987. All monies collected by Defendant Ragland because of the provisions of Act 188 of 1987 (pending the outcome of this proceeding) should be held by Defendant Ragland or Defendant Fisher (or by a third party so designated by this Court) in a special interest bearing account or accounts designated as the Cable Television Service Tax Collections Fund.

ATTORNEY'S FEE

21. Plaintiffs' solicitor should be apportioned and awarded a reasonable part of the total fund created by this action, (which fund will be comprised of both the state and local Gross Receipts Tax held to be illegally exacted from the members of the Plaintiff-class, plus interest as provided by Ark. Stat. Ann. § 84-4708) for professional services rendered to the named Plaintiffs and to the other members of the similarly situated class of taxpayers, pursuant to the provisions of Ark. Stat. Ann. § 84-4601, the provisions of 42 U.S.C. § 1988, or the "common fund" theory created by common law, with the balance of such fund being refunded to the individual members of the Plaintiff-class.

WHEREFORE, Plaintiffs pray that this Court will enter Orders and a Judgment finding as follows:

1. That the Defendants should be temporarily restrained from depositing any monies collected, because of the provisions of Act 188 of 1987, into the General Treasury of the State of Arkansas;

2. That the Court should set a hearing as soon as practicable to issue a preliminary injunction to the Defendants, requiring them to deposit the monies collected by them because of the provisions of Act 188 of 1987 into a specially designated interest bearing accouunt, which monies, after the payment of costs and fees, shall be held subject to refund to each member of the class when judgment in this proceeding becomes final;

3. That the Court find that the issues raised by this Complaint are common to all similarly situated taxpayers and governmental entities and that this action should be maintained as a class action on behalf of both the Plaintiffs and the Defendants, as representatives of the groups of taxpayers and governmental entities that they respectively represent;

4. That the Gross Receipts Taxes imposed because of Act 188 of 1987 will be declared unconstitutional and an illegal exaction;

5. That the total amount of illegally exacted Gross Receipts Taxes imposed because of Act 188 of 1987, together with interest as provided by law, will be accounted for and, after the payments of costs and fees, will be ordered refunded to the Plaintiffs and all similarly situated members of the Plaintiff-class;

6. That the Plaintiffs' attorneys be apportioned and awarded a reasonable part of the total fund held subject to refund as compensation for professional services performed and for reimbursement of costs expended, as provided by Ark. Stat. Ann. § 84-4601, by 42 U.S.C. § 1988, or under the "common fund" theory established at common law.

7. That the Court will grant such other and further relief as it deems just and equitable.

/s/ Eugene G. Sayre

Eugene G. Sayre
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

Solicitor for Plaintiffs and
All Other Members of the
Plaintiff-class

(CERTIFICATE OF SERVICE omitted in printing)

EXHIBIT A

ACT 188 1987
A BILL

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Representative Lipton

HOUSE BILL
784

For An Act To Be Entitled

"AN ACT TO AMEND SUBSECTION (c) OF SECTION 3 OF ACT 386 OF 1941, AS AMENDED, [ARK. STATS. ANN. §84-1903(c)] TO IMPOSE THE ARKANSAS GROSS RECEIPTS TAX UPON CABLE TELEVISION SERVICES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Subsection (c) of Section 3 of Act 386 of 1941, as amended, the same being Arkansas Statutes Ann. §84-1903(c) is hereby amended by adding the following paragraph (4) at the end thereof:

"(4) Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services."

SECTION 2. All laws or parts of laws in conflict with this Act are hereby repealed.

SECTION 3. It is hereby found and determined by the General Assembly that the State of Arkansas is in serious danger of losing revenues which are necessary to provide adequate funding for schools and other essential services required by the citizens of this State and the provisions of this Act are necessary to avoid a substantial reduction in State revenues. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1987.

3/12/87
APPROVED BY /s/ Bill Clinton

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

ANSWER TO SECOND AMENDED COMPLAINT
(Filed July 28, 1987)

Comes Charles D. Ragland, Commissioner of Revenues, and for his Answer to Second Amended Complaint, states:

(1) He admits the allegations in paragraphs 4, 5, 6, 8 and 15 of the Complaint.

(2) He admits the allegations in paragraph 2 except he denies the taxes to which cable television services will be subjected are illegal.

(3) He admits the allegations in paragraph 3 that Arkansas Cable Television Association is a not-for-profit trade organization with its principal office located in Pulaski County, Arkansas but is without knowledge of and denies the other allegations in this paragraph.

(4) He admits the allegations in paragraph 7 that Arkansas Association of Counties is a not-for-profit organization created under the laws of the State of Arkansas with its principal office and place of business in Little Rock, Pulaski County, Arkansas but is without knowledge of and therefore denies the other allegations in paragraph 7.

(5) He admits the allegation in paragraph 9 that the Arkansas Municipal League is a not-for-profit corporation created under the laws of the State of Arkansas, having its principal office and place of business in Pulaski County, Arkansas, but it is without knowledge of and therefore denies the other allegations in paragraph 9.

(6) He admits that the Complaint in this cause of action attempts to accomplish those things set out in paragraphs 10 and 14 of the Complaint but denies that any relief should be granted.

(7) He admits the allegations in paragraph 11 that this Court has jurisdiction to enjoin an illegal exaction under Article 16, Section 13, of the Arkansas Constitution and that the Court has jurisdiction to issue declaratory judgments under Ark. Stat. Ann. §34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure, but denies the Court should take jurisdiction under 42 U.S.C., Section 1983, in that no plaintiff in this cause of action has alleged any fact showing he is engaged in any activities involving free speech or free press.

(8) He admits the allegation in paragraph 20 that he will collect State and Local Gross Receipts Tax levied under Act 188 of 1987 but denies the tax is illegal and that any injunction should be issued or money put in any separate account.

(9) He is without knowledge of and therefore denies the allegations in paragraph 1, 12 and 13 of the Complaint.

(10) He denies the allegations in paragraph 16.

(11) He denies the allegations in paragraph 21.

(12) He is without knowledge of and therefore denies the general allegations in paragraphs 17, 18 and 19 of the Second Amended Complaint. Further the allegations in these paragraphs are general statements concerning the general practice and activities of cable television companies and other members of the media. There is no specific allegation of fact which would show that any particuular member of this class is engaged in free speech activities.

(13) The Complaint fails to state facts which show that:

(a) That the providing of cable television service is a constitutionally protected speech of press activity.

(b) How any speech or press activity which might be engaged in is discriminated against by Act 188 of 1987.

WHEREFORE, the Commissioner of Revenues prays the prayer in his original Answer be granted, his costs and all other proper relief.

CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

BY: /s/ Wayne Zakrzewski

Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

COUNTERCLAIM
(Filed August 4, 1987)

Comes Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, and for his Counterclaim against Plaintiff, Community Communities Company, and all similarly situated cable television service providers, states:

(1) The members of the above stated Plaintiff class will collect the sales tax from their customers at the rate of four percent (4%) plus any local tax due of the total gross receipts.

(2) If these Plaintiffs remit this tax to the Commissioner of Revenues on or before the 20th day of the month following the month in which it is collected they are allowed to remit only 98 percent of the tax due and keep two percent (2%).

(3) If Plaintiffs are successful in this cause of action the members of the class comprised of Daniel L. Medlock and other similarly situated taxpayers have requested and would be entitled to a refund of 100 percent of the amount which they paid and a refund may be ordered and adjudged against Defendants.

(4) The Commissioner of Revenues and therefore the State's and cities and counties which are members of the Defendant class would never have received those amounts kept by the members of the Plaintiff class who remit the tax as a discount.

WHEREFORE, Defendant prays that if a judgment is rendered whereby money collected under Act 188 of 1987 must be refunded that members of the Plaintiff class who collect the tax and receive a discount for their collection be required to contribute any money which they received as a discount in satisfaction of the judgment and that Defendant have judgment against them for such amounts and for all proper relief.

CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

BY: /s/ Wayne Zakrzewski

Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

ANSWER TO SECOND AMENDED COMPLAINT
(Filed August 4, 1987)

Comes now separate defendant, Jimmie Lou Fisher, Treasurer of the State of Arkansas, by and through her counsel, and for her Answer states:

1. The first unnumbered paragraph of plaintiffs' Second Amended Complaint is information in nature and as such requires no response. But insofar as it is plaintiffs' attempt to allege sufficiency of class representation under the provisions of Rule 22 of the Arkansas Rules of Civil Procedure, the allegation is denied.

2. Separate defendant Fisher admits upon information and belief allegations contained in paragraphs 1, 4, 5, 6, 8 and 15 of the Second Amended Complaint.

3. Separate defendant Fisher admits in part and denies in part allegations contained in paragraph 2 of the Second Amended Complaint in that she denies that the taxes to which cable television services will be subjected are illegal, admitting upon belief the remaining allegations in that paragraph.

4. Separate defendant Fisher admits in part and denies in part allegations contained in paragraph 3 of the Second Amended Complaint in that she admits upon belief that the Arkansas Cable Television Association is a not for profit trade organization with its principle office located in Pulaski County, Arkansas. Pleading further, she states that she is without sufficient knowledge or belief of and therefore denies the remaining allegations in that paragraph.

5. Separate defendant Fisher admits in part and denies in part the allegations contained in paragraph 7 of the Second Amended Complaint in that she admits upon belief that the Arkansas Association of Counties is a not for profit orrganization created under the laws of the State of Arkansas with its principle office and place of business in Little Rock, Pulaski County, Arkansas. Pleading further she states that she is without sufficient information or knowledge of and therefore denies the remaining allegations in that paragraph.

6. Separate defendant Fisher admits in part and denies in part the allegations contained in paragraph 9 of the

Second Amended Complaint in that she admits upon belief that the Arkansas Municipal League is a not for profit corporation created under the laws of the State of Arkansas, having its principle office and place of business in Pulaski County, Arkansas. Pleading further, she states that she is without sufficient knowledge or belief and therefore denies the remaining allegations in that paragraph.

7. Separate defendant Fisher admits that the Second Amended Complaint attempts to enunciate a general cause of action in paragraph 10 of the Second Amended Complaint. Pleading further, separate defendant Fisher denies a valid cause of action is stated in paragraph 10 of the Second Amended Complaint, that the plaintiffs' constitutionnal rights were violated, or that any relief as requested in that paragraph should be granted.

8. Paragraph 11 of the Second Amended Complaint is a jurisdictional statement, and as such requires no response but insofar as plaintiffs attempt to state a cause of action or otherwise imply that a valid cause of action exists, it is denied.

9. Separate defendant Fisher admits that in paragraph 12 of the Second Amended Complaint that plaintiffs attempt to characterize this action as a class action and to otherwise allege that the requirements for the maintenance of a class action suit under Rule 23 of the Arkansas Rules of Civil Procedure have been met. The validity of this characterization is denied.

10. Separate defendant Fisher is without sufficient information or knowledge to form a belief as to the truthfulness or accuracy of allegations contained in paragraph 18 of the Second Amended Complaint and therefore denies those allegations.

11. Separate defendant Fisher admits that plaintiffs attempt to state a specific cause of action for an illegal

exaction in paragraph 14 of the Second Amended Complaint. Pleading further separate defendant Fisher denies that a valid cause of action, as articulated in this paragraph, exists.

12. Separate defendant Fisher denies the existance or validity of all material allegations contained in Paragraph 16(a) through (d) of the Second Amended Complaint.

13. Separate defendant Fisher is without sufficient information or knowledge to form a belief as to the truthfulness or accuracy of allegations contained in paragraphs 17 - 19 of the Second Second Amended Complaint and therefore denies those allegations.

14. Separate defendant Fisher denies that plaintiffs are, or should be, entitled to any relief sought in paragraph 20, 21 of the Second Amended Complaint.

15. Separate defendant Fisher denies that plaintiffs are entitled to any relief sought in their prayer for relief (paragraphs 1 through 7) of their Second Amended Complaint.

AFFIRMATIVE DEFENSES

16. Separate defendant Fisher affirmatively states that plaintiffs fail to state a cause of action in that they fail to state facts which would show that:

(a) The provision of cable television services is a constitutional protected speech or press activity;

(b) That any First Amendment, speech or press activity, if engaged in by plaintiffs, is discriminated against by Act 188 of 1987 Acts of Arkansas;

(c) That any First Amendment, speech or press activity, if it is engaged in, is or will be subject to a deprivation of United States Constitutional Fourteenth Amendment Rights.

17. Affirmatively pleading, separate defendant Fisher states that Act 188 of 1987, Acts of Arkansas is constitutional as enacted.

18. Affirmatively pleading, separate defendant Fisher states that plaintiffs lack standing on all issues.

19. Affirmatively pleading, separate defendant Fisher states that plaintifffs have failed to meet the standards required for injunctive relief

20. Affirmatively pleading, separate defendant Fisher specifically reserves the right to amend her response and plead further.

WHEREFORE, separate defendant Jimmie Lou Fisher, Treasurer of the State of Arkansas prays that this Court dismiss this cause of action, for her costs, and for all other proper relief.

Respectfully submitted,

STEVE CLARK
Attorney General

BY: /s/ Kay J. Jackson Demailly

KAY J. JACKSON DEMAILLY
Assistant Attorney General
201 E. Markham
Heritage West Bldg.
Little Rock, AR 72201
(501) 371-2007

Attorneys for Separate
Defendant Jimmie Lou Fisher

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

SEPARATE DEFENDANTS' ANSWER TO
PLAINTIFFS' SECOND AMENDED COMPLAINT
(Filed August 5, 1987)

Come now Separate Defendants, Don Venhaus, Pulaski County Judge, Patricia Tedford, Pulaski County Treasurer and Pulaski County, Arkansas, by and through their solicitors, Ivester, Henry, Skinner & Camp, and for their Answer, state:

1. Judge Venhaus, Treasurer Tedford and Pulaski County deny each and every material allegation contained in the Complaint unless specifically admitted herein.

2. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraphs 4, 5, 6 and 15 of the Complaint.

3. Judge Venhaus, Treasurer Tedford and Pulaski County are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 1, 2, 3, 8, 9, 12, 16, 20 and 21 of the Complaint and, therefore, deny same.

4. Judge Venhaus, Treasurer Tedford and Pulaski County admit that this cause of action attempts to accomplish those things described in Paragraphs 10 and 14 of the Complaint but specifically deny that any relief should be granted.

5. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraph 7 of the Complaint to the extent that the Arkansas Association of Counties is a not-for-profit corganization created under the

laws of the State of Arkansas, but specifically deny that the purpose of the organization is to represent the legal interests of the respective county governments in the State of Arkansas.

6. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraph 11 of the Complaint to the extent that this Court has jurisdiction to enjoin an illegal exaction under Article 16, §13, of the Constitution of the State of Arkansas, and that this Court has jurisdiction to issue declaratory judgments under Ark. Stat. Ann. §34-2501 and Rule 57 of the Arkansas Rules of Civil Procedure. Judge Venhaus, Treasurer Tedford and Pulaski County specifically deny that Plaintiffs have alleged any facts which will allow this Court to impose such remedies. Further, Judge Venhaus, Treasurer Tedford and Pulaski County specifically deny that Plaintiffs have alleged any facts which will allow this Court to retain jurisdiction pursuant to 42 U.S.C. §1988.

7. Judge Venhaus, Treasurer Tedford and Pulaski County admit the allegations contained in Paragraph 13 of the Complaint to the extent that Pulaski County has imposed a 1% local Gross Receipts Tax, but specifically deny they are representative of a large number of Arkansas counties that have imposed the same. Judge Venhaus, Treasurer Tedford and Pulaski County are without knowledge or information as to the truth of the remaining averments in Paragraph 13 of the Complaint and, therefore, deny same.

8. Judge Venhaus, Treasurer Tedford and Pulaski County specifically deny the allegations contained in Paragraphs 17, 18 and 19 of the Complaint.

9. Plaintiffs' Complaint fails to state sufficient facts which might entitle Plaintiff to the relief requested.

10. Judge Venhaus, Treasurer Tedford and Pulaski County reserve the right to plead further.

WHEREFORE, having answered, Separate Defendants pray this Court enter an Order dismissing the Second Amended Complaint of Plaintiffs, allowing Plaintiffs to take nothing, and further, awarding Separate Defendants their costs, a reasonnable solicitor's fee and all other just and equitable relief to which they may be entitled.

Respectfully submitted,

IVESTER, HENRY, SKINNER & CAMP
221 West 2nd, Suite 411
Little Rock, Arkansas 72201

BY: /s/ Robert Keller Jackson
ROBERT KELLER JACKSON

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

PLAINTIFFS' ANSWER TO DEFENDANT RAGLAND'S COUNTERCLAIM

(Filed August 14, 1987)

Come now the representative members of the Plaintiff-class, and for their Answer to the Counterclaim filed herein by Defendant Ragland, regarding the 2% discount amount of the disputed state and local Sales Taxes imposed upon cable television services by the provisions of Act 188 of 1987, which 2% amount the individual cable television system operator-members of the Plaintiff-class are entitled to retain, under the provisions of Ark. Stat. Ann. § 84-1915, if such amounts are remitted to Defendant Ragland prior to the 20th day of the month following the month in which the disputed state

and local Sales Taxes are collected, and state and allege as follows:

1. Admits the allegations contained in paragraph (1) of Defendant Ragland's Counterclaim.

2. Admits the allegations contained in paragraph (2) of Defendant Ragland's Counterclaim.

3. Admits the allegations contained in paragraph (3) of Defendant Ragland's Counterclaim.

4. Admits the allegations contained in paragraph (4) of Defendant Ragland's Counterclaim.

Offer of Deposit

5. To avoid any possible or potential conflict between the cable television system operator-members of the Plaintiff-class and the cable television service taxpayer-subscriber members of the Plaintiff-class, over the 2% discount amounts collected by the former from the latter, the cable television system operator members of the Plaintiff-class will agree to the entry of an Order by this Court requiring them to pay the 2% discount amounts to Defendant Ragland, conditioned upon such amounts being ordered held in an interest bearing escrow account, outside of the State Treasury, pending a final decision in this case, upon the specific understanding and agreement that such amounts will be refunded, plus interest, to each respective cable television system operator-member of the Plaintiff-class if the Plaintiffs' constitutional contest of the provisions of Act 188 of 1987 is ultimately held to be unsuccessful.

WHEREFORE, the members of the Plaintiff-class pray that the Court will enter an Order requiring them to pay the 2% discount amounts of the disputed state and local Sales Taxes to Defendant Ragland, and that Defendant Ragland be required to hold such amounts in an interest bearing escrow

account outside the State Treasury, pending a final determination in this case.

BY: /s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

(Filed August 28, 1987)

ORDER ON PENDING MOTIONS

On July 16, 1987, the Plaintiffs herein filed a Motion requesting the entry of a Preliminary Injunction requiring the Commissioner of Revenues to create an interest bearing escrow account into which all of the disputed state and local Gross Receipts (Sales) Taxes imposed because of the adoption of Act 188 of 1987 would be deposited, until a Judgment becomes final in this action. On that same day, the Plaintiffs filed a Motion to Certify this case as a Class Action, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, wherein the movants requested the creation of both a Plaintiff-class and a Defendant-class. The various Defendants have responded, and the Commissioner of Revenues has filed a separate Motion for Preliminary Injunction and Counterclaim, requesting that the Court order all cable television system operators in the State of Arkansas to pay over to him the 2% discount amount such cable television system operators might be entitled to retain

if they file their monthly Sales Tax Reports on or before the 20th of the month following the month in which the disputed state and local Gross Receipts (Sales) Taxes in question were collected.

On August 19, 1987, an evidentiary hearing was held before the Court where both oral testimony and documentary evidence were introduced. After considering the matters presented by the pleadings, the motions and responses thereto, the evidence introduced at the August 19, 1987, hearing, and the arguments of all parties involved, the Court makes the following findings of fact and conclusions of law regarding the issues presented by these pending motions.

Findings of Fact

1. In the Second Amended Complaint filed herein on July 16, 1987, the Plaintiffs seek, on behalf of themselves and all similarly situated taxpayers and cable television system operators, to contest the legality and constitutionality of the state and local Gross Receipts (Sales) Taxes imposed by the provisions of Act 188 of 1987 as an "illegal exaction" under the provisions of Article 16, § 13 of the Arkansas State Constitution.

2. The Defendants have generally filed Answers admitting the jurisdiction of the Court and the identity of the parties, but denying that the extension of the state and local Gross Receipts (Sales) Taxes to cable television services by Act 188 of 1987 is an illegal or unconstitutional Act.

3. The questions of fact and law raised by the pleadings herein are questions common to all taxpayers in the Stte of Arkansas who subscribe to cable television services and to all county and city governments that impose a local Gross Receipts (Sales) Tax. These common issues predominate over any questions which may affect any individual taxpayer-subscribers to cable television services or any individual local governmental entity.

4. Certifying the above-styled cause of action as a class action will provide a fair and efficient adjudication of the controversy herein and it will enable the interpretation, validity and enforcement of the provisions of Act 188 of 1987 to be determined in a single forum in which all parties with an interest in the subject matter will have an opportunity to be heard and will spare the Defendants, in their official capacities, from the possibility of having to defend in a multiplicity of lawsuits on the same issue.

5. By granting the Motion for Preliminary Injunction filed by both the Plaintiffs and the Commissioner of Revenues, and by ordering the entire 100% of the disputed state and local Gross Receipts (Sales) Taxes to be held in an interest bearing escrow account outside of the State Treasury until a Judgment in this case becomes final, then the Court will protect the respective interests of all parties at a minimal administrative cost.

6. Testimony was offered at the hearing that there are over 400,000 subscribers to cable television services in the State of Arkansas and that there are over 100 separate cable television systems providing this cable television service.

7. The Court finds from the evidence introduced at the hearing that there is a substantial difference in the operation of the different cable television system operators throughout the State.

8. The allegations contained in the pleadings and the evidence introduced at the hearing on August 19, 1987, have established that there is a question as to the legality and constitutionality of Act 188 of 1987. Because of this fact, the Court has advanced this case on its trial calendar to decide and dispose of the issues involved herein as quickly as possible, so as not to needlessly disrupt the normal operations of government or to impose taxes which may be deemed "illegal exactions."

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Since an "illegal exaction" suit, brought pursuant to the provisions of Article 16, § 13 of the Arkansas State Constitution is by its very nature a "class action," the Court feels compelled to certify this action as a class action, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, only because the Supreme Court of Arkansas has previously held in its decision in the case of *City of Little Rock v. Cash*, 277 Ark. 494, 510-511 (1982) that it is in error for a trial court, under such circumstances, not to require the Plaintiffs to comply with the provisions of Rule 23.

3. The taxpayers, whose payments to their respective cable television system operators for cable television service are subject to the state and local Gross Receipts (Sales) Taxes because of the provisions of Act 188 of 1987, form a class of over 400,000 Plaintiffs, which class is so large that it is impractical to bring them all before this Court within a reasonable period of time. Therefore, the named Plaintiff-taxpayer herein, Daniel L. Medlock, will be certified as a representative Plaintiff to represent all similarly situated taxpayers in the State of Arkansas who subscribe to cable television service and who pay the disputed state and local Gross Receipts (Sales) Taxes imposed upon the charges for this cable television service, because of the provisions of Act 188 of 1987.

4. The Court finds that the cable television system operators who provide the cable television service in the State of Arkansas, the charges for which are subject to the state and local Gross Receipts (Sales) Taxes imposed by Act 188 of 1987, may have different substantive rights with regard to their allegations of abridgement of their constitutional rights to free speech and free press because of the nature and extent of their operations. Thus, the Court

finds that it would not be proper at this time to certify the substantive claims of this group as a separate class of Plaintiffs. However, solely for the purposes of managing the collection and distribution of the entire amount of the disputed state and local Gross Receipts (Sales) Taxes imposed upon the charges made for cable television service in the State of Arkansas (during the pendency of this suit), the Court does find that the class of entities represented by the Community Communications Company and the Arkansas Cable Television Association, Inc., forms a group of over 100 cable television system operators that is so large that it is impractical to bring them all before the Court within a reasonable period of time. Therefore, for the sole purpose of controlling and managing the collection of the disputed state and local Gross Receipts (Sales) Taxes in issue, the Court will certify Community Communications Company and the Arkansas Cable Television Association, Inc. as representatives of a class of cable television system operators who will be subject to the orders of this Court as a class of collectors of the disputed taxes.

5. The Plaintiffs have established the possibility that each individual taxpayer-subscriber member of the Plaintiff-class may suffer irreparable harm, due to an unnecessary diminishment of the amount that they might ultimately recover if the taxes in question are declared to be "illegal exactions," because of the added administrative costs that would have to be incurred if the Motions for Preliminary Injunction are not granted and an interest bearing escrow account is not created. Also, the Plaintiffs have raised questions as to the validity of the state and local Gross Receipts (Sales) Taxes imposed because of the provisions of Act 188 of 1987. Based upon these findings, and because of the recent Order issued by Associate Justice Harry A. Blackmun of the United States Supreme Court on August 14, 1987, to create an interest bearing escrow account in the case of *ATA, Inc., et al. v. Henry C. Gray, et al.*, another and similar "illegal exaction" case now pending before the Arkansas Supreme Court, this Court concludes that similar

action should be taken in this case to protect the interests of all parties involved.

Entered this 28 day of August, 1987.

/s/ Lee A. Munson

Honorable Lee A. Munson
Chancellor

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

PRELIMINARY INJUNCTION

(Filed August 28, 1987)

The representatives of the Plaintiff-class filed a Motion herein seeking the issuance by this Court of a Preliminary Injunction requiring the Defendant Charles D. Ragland, Commissioner of Revenues, to create an interest bearing escrow account and to deposit therein, instead of depositing with the State Treasurer, all of the disputed state and local Gross Receipts (Sales) Taxes collected by him, pursuant to the provisions of Act 188 of 1987, from the membrs of the Plaintiff-class.

In response, Defendant Ragland filed a Motion also seeking the entry of a Preliminary Injunction requiring the cable television system operators in the State of Arkansas, who actually collect and remit the disputed state and local Gross Receipts (Sales) Taxes imposed by Act 188 of 1987, to also remit to the Commissioner of Revenues the 2% discount amount of the disputed state and local Sales Taxes in question that are available to be retained by the cable television system operators, pursuant to the provisions of Ark. Stat. Ann. § 84-1915, if these state and local Sales Taxes

are remitted on or before the 20th of the month following the collection of such taxes.

The Court held an evidentiary hearing on these Motions on August 19, 1987. Based upon the allegations contained in the pleadings and motions of the parties, the oral testimony and documentary evidence offfered at the hearing, and the arguments of counsel contained in their respective briefs, the Court has made separate findings of fact and conclusions of law on the issues presented that are set forth in a separate Order that is being entered simultaneously with this Preliminary Injunction. Therefore, based upon the Court's findings and conclusions regarding the issues presented by the various Motions pending before this Court, it is hereby,

ORDERED that the Commissioner of Revenues shall immediately create an interest bearing escrow account, outside the State Treasury but subject to all procedures currently in place to collateralize deposits of the State of Arkansas. The Commissioner of Revenues shall deposit into that escrow account each month any and all state and local Gross Receipts (Sales) Taxes that are collected and paid to him because of the adoption of Act 188 of 1987, and he shall not deposit these state and local Gross Receipts (Sales) Taxes into the Treasury of the State of Arkansas. It is further,

ORDERED that any such state and local Gross Receipts (Sales) Taxes that have been so deposited into the State Treasury before the entry of this Preliminary Injunction shall be identified by the Commissioner of Revenues and shall be refunded to the Commissioner by the State Treasurer for deposit into this interest bearing escrow account. The State Treasurer shall not deduct any amount (3%) for collection fees from these funds and she shall not distribute any of these disputed state or local Gross Receipts (Sales) Taxes to other State agency accounts or to any county or municipal government, until a judgment in this suit shall become final. It is further,

ORDERED that the Commissioner of Revenues shall prepare a monthly record of the amount and source of these disputed state and local Gross Receipts (Sales) Taxes collected and deposited into the interest bearing escrow account and shall supply a copy of such record to the Court upon request, which information shall be held as confidential and not subject to disclosure. It is further,

ORDERED that the individual cable television system operator members of the Plaintiff-class shall pay over to Defendant Ragland, each month, the entire amount, including the 2% discount amount provided by Ark. Stat. Ann. § 84-1915, of all of the disputed state and local Gross Receipts (Sales) Taxes imposed upon the cable television services provided by them to the taxpayer-subscribers. It is further,

ORDERED that Defendant Ragland shall hold the 2% discount amounts in the interest bearing escrow account, outside of the Treasury of the State of Arkansas, pending a judgment entered in this case becoming final. It is further,

ORDERED that, if the challenge of the Plaintiff-class to the constitutionality of the provisions of Act 188 of 1987 is ultimately held to be unsuccessful by a Judgment that becomes final in this case, then, upon that Judgment becoming final, the 2% discount amounts held by Defendant Ragland under this Order, plus the proportionate amount of interest earned on account of their deposit in such account by each such amount, shall be refunded to the respective cable television service operator members of the Plaintiff-class who have deposited such 2% discount amounts each month with Defendant Ragland. Otherwise, all such funds shall be subject to the further Orders of this Court.

Entered this 28th day of August, 1987.

/s/ Lee A. Munson
Lee A. Munson
Chancellor

Approved as to Form and Substance:

/s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

SOLICITOR FOR PLAINTIFF-CLASS

/s/ Wayne Zakrzewski

Wayne Zakrzewski
Trial Attorney
Department of Finance and
Administration
P.O. Box 1272-L
Little Rock, Arkansas 72203

SOLICITOR FOR DEFENDANT
CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

/s/ Kay J. Jackson Demailly

Kay J. Jackson Demailly
Assistant Attorney General
Suite 310
201 East Markham
Little Rock, Arkansas 72201

SOLICITOR FOR DEFENDANT
JIMMIE LOU FISHER
STATE TREASURER

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

ORDER FOR CERTIFICATION AS CLASS ACTION
(Filed August 28, 1987)

On August 19, 1987, the Court took oral testimony and received documentary evidence and considered the arguments of the solicitors for the parties on the Motion filed herein by the Plaintiffs on July 16, 1987, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure, seeking an Order of this Court certifying the above-styled cause as a class action. The Court has today entered a separate Order containing findings of fact and conclusions of law with regard to the issue raised by the Plaintiffs' Motion for Certification as a Class Action. Accordingly, it is hereby

ORDERED that the Motion of the Plaintiffs requesting certification of this matter as a class action should be, and is accordingly hereby, granted in part and this action is hereby certified as a class action, pursuant to the provisions of Rule 23 of the Arkansas Rules of Civil Procedure and in conformity with this Order. It is further,

ORDERED that this Court certifies as two separate classes of Plaintiffs. These classes are certified as follows:

Class No. 1. All taxpayers in the State of Arkansas who, as subscribers to cable television services, are required to pay the state and local Sales Taxes imposed because of the provisions of Act 188 of 1987. This class of Plaintiffs shall be represented by Daniel L. Medlock.

Class No. 2. All cable television system operators in the State of Arkansas who are required to collect and remit to Defendant, Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, the

state and local Gross Receipts (Sales) Taxes imposed because of the provisions of Act 188 of 1987. This class of Plaintiffs shall be represented by Community Communications Company and the Arkansas Cable Television Association, Inc., and this class is certified solely for the purpose of managing the collection and distribution of the disputed state and local Gross Receipts Tax moneys. This group of cable television system operators is not certified as a class regarding their substantive claims of alleged violations of their constitutional rights. It is further,

ORDERED that since the Court has ordered the creation of an interest bearing escrow account in which the disputed state and local Gross Receipts (Sales) Taxes imposed because of the provisions of Act 188 of 1987 are to be held until a Judgment becomes final in this case, then the Court defers any decision with regard to the Plaintiffs' request for the certification of a Defendant-class composed of counties and cities in Arkansas where a local Gross Receipts (Sales) Tax is imposed, because none of the disputed taxes would even be available for distribution to such local governmental entities, until after a Judgment in this action becomes final. It is further,

ORDERED that the parties hereto are specifically exempted from any requirement of giving further notice in this matter, since the entry of this Order is deemed sufficient notice to the affected class of taxpayers and cable television system operators.

Entered this 28 day of August, 1987.

/s/ Lee A. Munson
Honorable Lee A. Munson

APPROVED AS TO FORM

/s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

SOLICITOR FOR PLAINTIFF-CLASS

/s/ Wayne Zakrzewski

Wayne Zakrzewski
Trial Attorney
Department of Finance and
Administration
P.O. Box 1272-L
Little Rock, Arkansas 72203

SOLICITOR FOR DEFENDANT
CHARLES D. RAGLAND
COMMISSIONER OF REVENUES

/s/ Kay J. Jackson Demailly

Kay J. Jackson Demailly
Assistant Attorney General
Suite 310
201 East Markham
Little Rock, Arkansas 72201

SOLICITOR FOR DEFENDANT
JIMMIE LOU FISHER
STATE TREASURER

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

SUPPLEMENT TO ANSWER TO
SECOND AMENDED COMPLAINT
(Filed November 9, 1987)

Comes Jim C. Pledger, Commissioner of Revenues for the State of Arkansas and in Supplement to his Answer previously filed herein states:

(1) 16(b) of Plaintiff's Second Amended Complaint alleges that Act 188 of 1987 selectively imposes upon the providers of cable television service a tax burden not shared by the providers of other forms or instrumentalities of public communications, either of an electronic or print media in violation of certain constitutional provisions.

(2) Although Plaintiff has never alleged facts stating how this discrimination occurs, it is apparent from hearings held in this Court that Plaintiff contends that Plaintiffs are discriminated against because cable television is required to collect and remit sales tax for its services while newspapers and magazines are exempted from the tax.

(3) Newspapers and magazines are exempted from the tax by the provisions found at Ark. Stat. Ann. §84-1904(f) and §84-1904(j).

(4) The Commissioner of Revenues denies that there is any prohibited discrimination against Plaintiffs under present law. However, if any discrimination exists, the discrimination is caused by the exemptions granted to newspapers and magazines and not by the levy of the tax on the service provided by Plaintiffs.

(5) If the Court finds discrimination exists, the Court should declare the exemptions granted to newspapers and

magazines are unconstitutional rather than declaring Act 188 of 1986 to be unconstitutional.

WHEREFORE, Defendant prays the Complaint and all Amendments thereto be dismissed or, in the alternative, that the Court find Act 188 to be valid but those exemptions which create any discrimination which might be found by the Court to be invalid, that the Commissioner be relieved from depositing the money resulting from Act 188 in escrow, for his costs and all other relief.

JIM C. PLEDGER
COMMISSIONER OF REVENUES

BY: /s/ Wayne Zakrzewski

Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, Arkansas 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

PLAINTIFFS' MOTION TO STRIKE SUPPLEMENT TO DEFENDANT PLEDGER'S ANSWER OR, ALTERNATIVELY, TO DENY WHAT APPEARS MAY BE ALLEGATIONS IN THE NATURE OF A DECLARATORY JUDGMENT

(Filed May 2, 1988)

Comes now the Plaintiffs, by and through their undersigned solicitor, and do hereby move this Court to strike the Supplement to the Answer to Second Amended Complaint of Defendant Pledger, which is unnumbered, but was filed

herein on October 10, 1987. Alternatively, Plaintiffs move that the request for relief contained in paragraph (5) of the Supplement to Answer to Second Amended Complaint of Defendant Pledger, which appears to be in the nature of a request for declaratory judgment, will be denied. As grounds for this Motion, the Plaintiffs would respectfully show this Court as follows:

1. Defendant Pledger filed a pleading herein on October 10, 1987, entitled Supplement to Answer to Second Amended Complaint.

2. The allegations contained in the five (5) numbered paragraphs of this Supplement to Answer filed by Defendant Pledger on October 10, 1987, do not state a set of facts upon which relief can be granted by this Court.

3. The allegations contained in paragraph (5) of the Supplement to Answer to Second Amended Complaint filed herein by Defendant Pledger apparently request that this Court enter a declaratory judgment, inasmuch they seek to have this Court declare invalid the exemption (from the state and local Gross Receipts (Sales) Taxes provided by Ark. Code Ann. § 26-52-401(5), (14) and (15)) for the sale of newspapers, newspaper advertising space and magazines in the State of Arkansas.

4. The issue raised in paragraph (5) of the Supplement to Answer to Second Amended Complaint filed by Defendant Pledger is not properly before this Court in this action, and does not affect the relief sought by the Plaintiffs regarding the imposition of the state and local Gross Receipts (Sales) Taxes upon the charges made for cable television services. Therefore, these allegations should be stricken, or alternatively, the request for a declaratory judgment filed by Defendant Pledger should be denied.

5. The allegations contained in paragraph (5) of the Supplement to Answer to Second Amended Complaint filed

by Defendant Pledger herein on October 10, 1987, seek to have the provisions of a statute declared illegal. Defendant, Pledger, as the Commissioner of Revenues, whose duty it is to administer and interpret the taxing statutes of this state, does not have standing to challenge the validity of the exemption provisions of Ark. Code Ann. § 401(5), (14) and (15) which affect private interests, as opposed to the public interest.

WHEREFORE, the Plaintiffs pray that their Motion to Strike Supplement to Answer Defendant Pledger will be granted, or, in the alternative, that the relief sought by the allegations contained in the Supplement to the Answer to Second Amended Complaint of Defendant Pledger, which appear to be in the nature of a request for a declaratory judgment, will be denied.

Respectfully submitted,

/s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 Capitol Tower
Little Rock, Arkansas 72201
(501) 375-1122

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

MOTION TO INTERVENE
(Filed on May 4, 1988)

Comes applicant City of Fayetteville, Arkansas and for its Motion to Intervene states:

1. Applicant's defense and the main action have common questions of law and fact. Plaintiffs' complaint challenges the validity of Arkansas Acts 1987, No. 188 which extends the state and local sales (gross receipts) taxes to charges for cable television services. The City of Fayetteville, Arkansas has levied a one percent local sales (gross receipts) tax pursuant to Ordinance No. 2933 adopted August 2, 1983, a copy of which is attached hereto marked Exhibit "A" and made a part hereof. Said tax was approved at a special election held September 6, 1983, the results of which were certified by the Washington County Election Commission in the certificate attached hereto marked Exhibit "B" and made a part hereof.

2. The intervention will not unduly delay or prejudice the adjudication or the rights of the original parties because the case can be tried May 9, 1988, as scheduled if intervention is granted.

3. Attached hereto, marked Exhibit "C", and made a part hereof, is Intervenor's Answer setting forth the defense for which intervention is sought.

WHEREFORE, the City of Fayetteville, Arkansas prays that it be permitted to intervene in this action.

CITY OF FAYETTEVILLE,
ARKANSAS
INTERVENOR

BY: /s/ James N. McCord

James N. McCord
CITY ATTORNEY
113 W Mountain
Fayetteville, Arkansas 72701
(501) 575-8313

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

ANSWER
(Filed May 4, 1988)

Comes Intervenor City of Fayetteville, Arkansas and for its Answer to Plaintiffs' Complaint, as amended, states:

1. Intervenor admits the factual allegations in Plaintiffs' Complaint, as amended.

2. Intervenor admits that the Court has jurisdiction over the parties and admits that the Court has jurisdiction over the subject matter under Art. 16, §13 of the Constitution of the State of Arkansas.

3. Intervenor denies that Arkansas Acts 1987, No. 188 violates the United States Constitution, the Arkansas Constitution, or the provisions of §542 of the Cable Communications Policy Act of 1984, 42 U.S.C. §542.

4. Intervenor denies all allegations in Plaintiffs' Complaint, as amended, not expressly admitted herein.

5. As an affirmative defense to Plaintiffs' claim for a refund of tax revenues collected before creation of the escrow fund pursuant to the Court's order of August 28, 1987, Intervenor pleads voluntary payment.

WHEREFORE, Intervenor City of Fayetteville, Arkansas prays that Plaintiffs' Complaint be dismissed and for all other relief to which it may prove itself entitled.

CITY OF FAYETTEVILLE,
ARKANSAS
INTERVENOR

BY: /s/ James N. McCord

James N. McCord
CITY ATTORNEY
113 W Mountain
Fayetteville, Arkansas 72701
(501) 575-8313

(CERTIFICATE OF SERVICE omitted in printing)

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION

DANIEL L. MEDLOCK, et. al. PLAINTIFFS

VS. NO. 87-2401

JAMES C. PLEDGER, C mmissioner of Revenues: et. al. DEFENDANTS

Testimony and other proceedings taken ore tenus at the Bar of this Court on the *19th* day of *August, 1987,* before the HONORABLE LEE A. MUNSON, Chancellor, presiding.

APPEARANCES

FOR THE PLAINTIFFS,
Honorable Eugene Sayre

FOR THE DEFENDANTS,
Honorable Wayne Zakrzewski
Honorable Winston Bryant
Honorable Barry Copin
Honorable Robert Jackson
Honorable Kaye J. DeMalley
Honorable James Parker

PROCEEDINGS OF WEDNESDAY, AUGUST 19, 1987:

* * *

[665] *BOB BLOUNT*, a witness called in behalf of the Plaintiffs, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address for the record, sir?

A. My name is Bob Blount. I live at 2609 Shenandoah Valley Drive in Little Rock.

* * *

[666] Q. What is your profession or employment please, sir?

A. I operate Association Services, which is a trade association management company.

Q. Is the Arkansas Cable Television Association one of the trade groups that you represent?

A. Yes, it is. Arkansas Cable Television Association is one of my clients, and I serve as the Executive Director—Executive Secretary of that association.

A. And, how long have you so held that position?

A. Since—I've held that position since March of 1984.

* * *

Q. Would you describe for the Court the entities that compose the Arkansas Cable Television Association?

A. The Arkansas Cable Television Association is the trade association which represents all of the cable television

operators in the State of Arkansas. We have approximately a hundred—somewhere between a hundred and a hundred and ten cable systems within Arkansas, eighty of which are dues-paying members of the state association.

Q. This is throughout the State of Arkansas?

A. Yes, it is.

* * *

[667] Q. Are there entities that are cable system operators in the State of Arkansas that are not members of the association?

[668] A. Yes, there are. My estimate is that there is approximately twenty perhaps cable systems which are not members of the association.

Q. Can you tell us if they are large or small systems?

A. For the most part, they're very small systems. My guess is that they constitute fewer than five thousand subscribers.

Q. In your position as Executive Director of the association, have you had cause to study or make statistical findings of the number of cable television subscribers in the State of Arkansas?

A. Yes, I've done this from two standpoints. Yes, I have.

* * *

Q. And, from those two sources, have you determined the approximate number of cable television subscribers in the State of Arkansas?

A. Yes, it's somewhere close to four hundred thousand.

[669] Q. That would be four hundred thousand separate subscribers.

A. Yes.

Q. Have you had cause to determine what the average billing per subscriber would be to the State?

A. I've tried to determine this exactly. My best guess would be—

* * *

A. I couldn't tell precisely based upon the responses that we received, because some of the members did not desire to share that information with us. Our guess is that it's somewhere between Thirteen and Fifteen Dollars a month is the average basic—the average bill.

[670] Q. The average bill?

A. Yeah.

Q. And, to that, the sales tax in question would be applied as those are the gross proceeds per subscriber.

A. No, it would be—the sales tax would apply to more than that. The sales tax would also apply to installation charges, any equipment rentals in addition to this basic monthly bill.

Q. Approximately of these hundred systems, how many communities are served in the State of Arkansas?

A. Somewhere close to three hundred communities, and the reason for me hedging on that response is that it's kind of hard to define "what is a community?". Is it incorporated or what? Named-areas? About three hundred.

Q. All right. Am I correct, Mr. Blount, that these cable system are operated on franchises granted by some local governmental authority?

A. Yes.

Q. Using Pulaski County as an example, because that's where the Court is, coiuld you explain how many separate franchises or systems there are here in the county?

A. I think there are about six or seven franchises—

* * *

Q. And, does one cable operator have more than one cable franchise in a county?

A. Yes, sir.

[671] Q. And, are those called MSOs or Multiple System Operators?

A. Yes, sir.

* * *

Q. When did cable begin in Arkansas approximately?

A. Approximately 1954. About 1954.

Q. Where?

A. In Batesville, Arkansas.

Q. Is there any significance about it being first?

A. It was probably one of the first two or three cable television systems in the United States. Jim Wyatt Davidson operated a television/radio repair shop in Batesville, and in

order to pick up the Memphis television station, he ran a line off of his antenna to his neighbor next door and charged him a dollar a month for it.

Q. Would you describe—are you familiar with the basic types of cable services that are provided in the State of Arkansas?

A. Generally speaking.

Q. What are the sizes of the systems—the various systems? By that I [672] mean, how many subscribers will a system have? How do they rate from small to large?

A. The average system—do you have a copy of my directory? Right in the front of that directory I think I have that data, if I'm not mistaken. The average system in Arkansas has four thousand, three hundred subscribers. That runs from the largest of something like sixty-eight thousand subscribers down to the smallest, which is about a hundred and twenty-something subscribers. The mean number of subscribers is right at two thousand. That's midway between the largest and the smallest.

Q. What type of services do these cable systems provide to their subscribers?

A. Well, they provide—first of all, they provide a basic cable service, which is the basic rate. The programming which comprises the basic rate. This would normally be constituted of your broadcast network affiliates and many of your—most of your ad-supported satellite delivered services, and some super stations such as WTBS, WOR out from New York, and WGN from Chicago. That would be your basic, and then in addition to that, there is a premium service such as your movie channels, your Home Box Office, Showtime, and then there are—yeah, that pretty much describes it.

Q. And, these are run by a cable from the receiving station to each individual home or business?

A. Yes.

Q. And, in 1984, the National Cable Policy Act was passed. Does it provide definitions and standards for the cable industry?

[673] A. Yes, sir.

Q. Mr. Blount, I hand you what's been marked as Defendant's—excuse me—Plaintiff's Exhibit Number Two, and ask if you can identify that please, sir.

A. This is a copy of a communication we received from a National Cable Television Association in Washington, D.C., which lists a number of scrambled programming services for which individuals with their own earth receiving stations might—to which they might subscribe.

Q. These—Listed on Plaintiff's Exhibit Number Two are simply the scrambled services that are available?

A. Yes, sir. At the present time, I think there are a total of seven.

Q. These are services that are provided for a fee known as the premium channels on most cable systems?

A. That is correct, sir.

Q. They are also available through satellite broadcasts directly to individuals who own tv. dishes or satellite dishes?

A. That's right, sir.

Q. Would you tell me what the fees that are listed here—the costs listed here represents?

A. The prices quoted on this list are the prices to the individual who has the backyard dish. This is the amount they would pay to the program provider for this service.

* * *

[674] MR. ZAKRZEWSKI: Your Honor, I don't quite understand. Is the National Cable Television Association the folks that charge these fees?

A. No, sir, those are the—if you'll see the 800-numbers on there. The numbers that the individuals would call to get that service directly from the service provider.

THE COURT: If you had a dish yourself. A satellite dish.

MR. ZAKRZEWSKI: And, there are the fees that you would have to pay, and they'd be bound to give you this service at this fee.

A. Yes, sir, I would assume so.

* * *

[675] BY MR. SAYRE:

Q. All right. There are certain terms of art that have come to be used [676] in the cable industry. Would you describe for the Court what a SMATV or S-M-A-T-V is?

THE COURT: First, what does it stand for?

A. It stands for Satellite Master Antenna Television.

THE COURT: Why don't we talk that way then?

MR. SAYRE: All right.

BY MR. SAYRE:

Q. What is a—would you describe for the Court what a System Master Antenna Television system is?

* * *

A. My understanding of that term is that it is a single antenna which distributes—from which television signals are distributed to a number of sets, monitors, or locations.

Q. But generally within one continuous piece of real property, such as a trailer park?

A. Yes, sir.

Q. Or an apartment house?

A. Yes, sir.

Q. What is a Community Antenna Television System or a CATV?

A. My understanding of that is this would be a broadcast antenna like the antenna you would see on a residential roof, but you would see it at [677] like an apartment house, but this would receive broadcast signals again to be distributed to a number of locations.

Q. And, what is a Pay-Per-View or PPV service?

A Pay-Per-View is a term applied to television programming for which the individual may subscribe for that one single event or one movie. As an example, some of our cable systems in the state are fully addressable in that they can send a specific signal to a specific location. They, in turn, offer pay-per-view where an individual can call in and order the movie on one night, rather than paying the fee for, you know, the whole month.

Q. What are the—what is a satellite broadcast of these—well, of any electronic signals carried by a cable system? How is it done? How does it occur?

* * *

A. A cable operator. Normally most of the signals come in from satellite—what they call a geo-stationary satellite out in space down link. The signal comes down to the dish that we're all familiar with. It's then run through a seriess of amplifiers and modulators to place the signal over a wire, which then conducts the signal to a house or the subscriber. Another form of reception for the cable operator is where you would receive your standard broadcast television stations. You know, this wouldn't be from space orbit.

[678] Q. In—I hand you what has been marked as Plaintiff's Exhibit Number Three, and ask you if you can identify that.

A. This is a listing also received from—by way of the National Cable Television Association in Washington of unscrambled satellite services, which can be received any any earth station without any additional deciphering unscrambling equipment.

Q. Are all of these services available to cable system operators to put on their cable systems?

A. Yes, sir.

Q. For a fee?

A. Yes.

* * *

[679] Q. Plaintiff's Exhibit Number Three, Mr. Blount, represents the variety of services that could be put on a system?

A. Yes, I should point out at this point, sir, that the difference between this listing and the other listing that we—in Exhibit Two—is that all of the scrambled programming in Exhibit Two, the backyard subscriber must also have a descrambler piece of equipment in order to receive one.

THE COURT: In Exhibit Three, you don't need one?

A. In Exhibit Three, you do not need one.

Q. How many channels does the average system or what do they range in Arkansas? You said they ranged from a hundred and fifty up to I forgot how many thousands.

A. It's infinite depending upon the number—on how sophisticated equipment they want. The average system in Arkansas on the average offers about thirty-two channels of programming.

Q. But there are more than thirty-two separate services available?

A. Far more.

[680] Q. So there has to be a picking and choosing of what is put on?

A. There certainly does.

Q. What is the smallest number of channels that you know of?

A. The smallest number that I'm aware of is twelve.

Q. And, the largest number of channels available?

A. I believe about—well, they say sixty-four, but I don't know of anybody that's offering sixty-four channels of programming.

Q. Are the members of the Arkansas Cable Television Association, who are cable system operators, charging and collecting the sales tax since July 1st?

A. Yes.

* * *

Q. Mr. Blount, have you ever personally participated in any original programming by a cable system operator in the State of Arkansas?

A. Yes, sir.

Q. Would you explain to the Court what your personal participation was?

A. The most recent was during the special session of the Seventy-six [681] Assembly. We did from the studios of Storer Cable here in Little Rock a nightly wrap-up of the activities of the day at the State Capitol. A program which I hosted and moderated.

Q. And, was that program shown on cable television systems in the State of Arkansas?

A. Yes, it was. We broadcast it live at Six-thirty each evening over Storer Cable, taped it, rebroadcast it again at Eight O'clock in Little Rock, and in North Little Rock, Jacksonville, and Sherwood. We made copies of it which I distributed to about six systems in the State which showed it the next day.

Q. Are there other instances of original programming by cable system operators of which you are personally aware?

A. Oh, a great many.

Q. Would you describe those that you have personal knowledge of to the Court?

A. Oh, my!

Q. Well, a few to satisfy Mr. Zakrzewski that you know of the types of programs.

A. Well, a good example here in Little Rock is the Black Access channel. There's a whole studio available which shows nothing but that sort of programming from here in Little Rock. The cable system at Hamburg, Arkansas, goes out with a little hand-held camera and tapes the high school football games on Friday nights and shows them again on Saturday. I've seen those videotapes.

Q. What about Christmas parades and those types of things?

[682] A. Oh, just you name it. Happy Birthday announcements. Any number of—

THE COURT: (Interposing) Wouldn't you say that the most common though would be a local weather bar that rolls around and advertising and that sort of thing?

A. Yes, sir.

Q. Are there community bulletin boards or original—

A. (Interposing) Almost every system in the state has that kind of thing.

Q. Using the Riverside system here in Little Rock as an example, because we're here, are there public access channels in that system?

A. There's seven. About six or seven here on the Little Rock system alone.

Q. Would you describe for the Court what they are?

A. Well, there's a public access local originationn channel over which we broadcast our legislative wrap-up each evening.

Q. That's on Channel Two?

A. Channel Two. There's a Fine Arts channel which carries a schedule of Fine Arts activities and also broadcasts radio station KLRE as the Little Rock School District's radio channel.

Q. Is that Channel Four?

A. That's Channel Four. Local government access which broadcasts the city council meetings in Little Rock live and also tapes them.

Q. That's Channel Eleven?

A. That's Channel Eleven. There's the Black Access channel to which I [683] previous eluded. It's Channel Fourteen. Channel Nineteen is the Educational Access channel where they show the school board meetings. They can do those live or tape. Channel Twenty-eight is a local religious access where any religious organization can come and have their programming shown. University Access channel is Channel Twenty-nine here in Little Rock. The University of Arkansas at Little Rock has its own studios, and it does its own programming.

Q. Who provided the equipment for the University?

A. Storer Cable does.

Q. The cable system operator here in the City?

A. Yes.

Q. Mr. Blount, at your request, has a taped example of these types of original programmings been prepared for you?

A. Yes.

Q. Would you describe for the Court what you have requested and what has been produced?

A. I asked Storer Cable to put together a short, perhaps, five to eight minute tape which would show some examples of the types of local origination programming done by cable operators with particular emphasis on subject matter which might demonstrate the editorial discretion exercised by cable operators.

MR. SAYRE: And, I believe that that program is now loaded on the VCR, and I believe that the tape will run slightly over two minutes when we're finished, Your Honor. We would like at this time to mark that as Plaintiff's Exhibit Number Four and offer for the [684] Court and the counsel of record the example—the video example of the original programming done by cable system operators here in the state and that Mr. Blount can be cross examined and identify and discuss.

* * *

[685] MR. SAYRE: Your Honor, at this time, the Plaintiffs and Defendants' solicitors previewed the two minutes worth of the example of the original programming which has been prepared at Mr. Blount's request, and we would ask at this time permission to play that and offer it and offer it into evidence for the Court?

THE COURT: Gentlemen?

MR. ZAKRZEWSKI: Your Honor, * * * I would ask that I be allowed to voir dire the witness and ask him some questions concerning what—

THE COURT: (Interposing) You may do so.

VOIR DIRE

[686]

BY MR. ZAKRZEWSKI:

Q. Okay, Mr. Blount, when Mr. Sayre started questioning you concerning this tape, he asked you of your own knowledge if you knew about original programming. What do you mean by original programming of cable t.v. in your definition?

A. It can have two definitions. One of which—an example is our coverage of the Legislature. This legislative report that we did each evening in which we went into the studio of the cable television company, used their cameras, their directors, their equipment, and their cable to create this program on site and deliver it live and tape it for later transmission. That's one definition of original. The other definition of original programming is programming that either is created or occurs, which is broadcast only over that cable system, or only over cable television.

Q. In the case of the broadcast of the legislature, is that—was that broadcast under what would commonly be called the Government Access channel?

A. That was over what we call the Local Access channel. The local origination.

Q. Is that what—

A. (Interposing) Public access, local origination—no, that's not the government access channel.

Q. Okay, but is it one of those channels that is required under the cable television policy act that you mentioned?

[687] A. No.

Q. Would it be regulated as a public access or government access under that act?

A. No. The cable—the cable operator determines what goes over that channel.

Q. In that—in that particular program, did the cable operator have any input into the content of that program, or do he just tape it?

A. I, as executive secretary of the cable association was executive producer, and I determined what went on, what questions were asked, who the hosts were, who the guests were, and guided the discussion.

Q. Are the cable operators required by the local franchiser to provide any of this type of service?

A. It depends upon the franchiser.

Q. Okay, in this particular case?

A. I'm not sure what Storer's franchise calls for in this case. I doubt very seriously if the franchise—

* * *

THE COURT: (Interposing) I can't take Judicial notice of it, but I do recall the negotiations and what Mr. Bentley's paper printed. There were some requirements before the franchise was given to Storer, and that [688] be—along with some patrons of the City who requested certain things, and it was compromised.

A. If I might add, with regard to this particular program that we did, we weren't required to do that.

Q. And you know that in your own knowledge?

A. Yes.

Q. How do you know that of your own knowledge?

A. Because it wouldn't have been done if I hadn't stepped forward and said, "Let's do it".

Q. But, it's possible that some of that—that that went to fill some requirement, is it not?

A. It's possible.

Q. So, still then you do not know that that was not required for them to get that franchise, do you?

A. No.

* * *

[689] Q. Are you aware that Section 531 of 47 USC states that a cable operator shall not exercise any editorial control over any public, educational, or governmental use of the channel capacity provided?

A. I'm aware of that.

Q. And, are you aware that the same is true that they're prohibited from controlling any editorial control over any video programming or—under Section 532—for the commercial use of these channels?

A. I don't understand that.

Q. Okay, Section 532 of the Cable T.V. Act at Subsection C-1 states that the person—cable operator shall not exercise any editorial control over any video programming provided pursuant to this Section. And that's the Subsection to

Section 532. Section 532 deals with cable channels for commercial use. So, the cable operators are prohibited—

A. (Interposing) Yes, from that sort of thing, but that wasn't what we were doing here.

Q. And this isn't—even though it is a broadcast of the legislature, it is not a government access type of channel?

A. No, sir.

Q. What would distinguish that from a Government Access channel?

A. We have a Government Access channel, sir.

Q. But, how would that be distinguished? I understand you've got that.

A. This was—this was an editorial with straight journalistic reporting activities in the legislature. It was not a Government Access channel, in that it showed a city council, or an elected body, or any function other—

[690] THE COURT: (Interposing) The legislature didn't request to use that channel at this session to put that on there. Is that correct?

A. No, sir, that's correct.

Q. What about—you had on there about the University of Arkansas programming. Who is responsible for the content of that program?

A. The University of Arkansas staff creates the programming. It uses the staff with equipment provided by Warner Cable of Fayetteville. The programming wouldn't be run if the cable operators around the state didn't elect to run it.

Q. Is it run on Public Access channel, or what channel would it be run on?

A. I imagine it's probably—I don't know. I don't know the answer to that.

Q. There's also an Educational channel that that could be run on, is that correct?

A. Yes.

Q. Do you know who determines what programs are run on the public access and educational channels?

A. On the Public Access channels, the local cable manager determines what's run on it. On the Educational channels, I really don't know who determines what runs on that.

Q. Can you refuse to run programming on the Public Access channel?

A. I don't know. I don't know of any program that' been refused.

Q. So that your statement a minute ago that if the cable operator didn't choose run it, it wouldn't be run, is not quite correct in this case then, is it?

THE COURT: There are certain areas that the cable operator or manager, I'm sure, could decide not to run something if it were so offensive to the public or something of that nature.

MR. ZAKRZEWSKI: Well, we're not—you know, assuming we are not talking about obscenity programming.

A. I would—I would—I would—and again, this is my personal belief—

THE COURT: We are going to have to talk about obscenity. Your are talking about hate, hatred, antisemitic, racist.

A. The cable operator in Little Rock does not choose to run that agricultural report from the University of Arkansas.

* * *

THE COURT: Let her roll.

(WHEREUPON, A VIDEO TAPE WAS SHOWN TO THE COURT.)

FURTHER DIRECT EXAMINATION
[692]

BY MR. SAYRE:

Q. To your knowledge and experience as Executive Director of the Cable T.V. Association, is the two minutes worth of film or taped examples of original programming representative of the type and of the variety of the original programming done by cable television operators in the State of Arkansas?

A. Yes, it is.

* * *

Q. Are there certain news channels that are carried by cable systems that are not carried by broadcast systems?

A. Yes, sir.

Q. Would you give an example of that, please, sir?

[693] A. A good—probably the best example is C-Span.

Q. And, is that the government reporting or the news channel?

A. There are two channels both originating in Washington, D.C. C-Span—the original C-Span covers the U.S. House of Representatives, gavel to gavel, and then when they're not in session, with supplementary news broadcasts from Washington. C-Span II, which began, I believe, last year, covers the U.S. Senate under the same circumstances.

Q. At the present time, is the C-Span unit or company here in Little Rock?

A. Yes, they are.

Q. And what are they doing here?

A. They are covering the Southern Legislative Conference with sixteen hours a day live programming.

Q. And is that broadcast on wireless or only on cable systems around the country?

A. That's strictly cable systems, satellite delivered.

Q. We spoke of editorial discretion, and Mr. Zakrzewski asked you that according to the Cable Policy Act, the Public Access channels, the cable operator could not interfere with or censor in any way. What about the other channels, and what type of, if any, editorial discretion is exercised on the non-access channels on a cable system?

A. I'm not sure I understand.

Q. Well, what kind of programs—who makes the determination of what programs are put on?

A. The cable operator determines. The manager or the owner of the [694] system has a finite number of channels, and he has to determine which of these dozens of programming services he is going to carry on his system.

Q. And, he could carry any of those listed on Plaintiffs' Exhibit Two or Plaintiff's Exhibit Three?

A. Yes.

Q. And if the system only had twelve channels, he has to decide which to carry?

A. That's right.

* * *

CROSS EXAMINATION

QUESTIONS BY MR. ZAKRZEWSKI:

[695] Q. Your association doesn't provide any services, does it, Mr. Blount? Any cable t.v. services?

A. Provide any cable t.v. service, no.

Q. Have you ever operated a cable t.v. system as an operator?

A. No, sir.

Q. Do you, of your own knowledge, know how the cable t.v. operators decide what programming can be put on?

THE COURT: That is dictated in the market place obviously.

A. That is a function of the market place. I was trying to formulate my response, but that's—it is.

Q. Do you know if they would use surveys, or something of that nature?

A. Sometimes.

Q. Nielson type surveys?

A. Sometimes. In many cases, with a smaller system, it's strictly the tastes of the cable owner.

Q. But, he's going to put on t.v. basically what he thinks he can sell to his customers, is that correct?

A. That and what the customers desire.

Q. And what? I didn't hear the last of that.

A. That, and what the customers seem to desire as in the case of C-Span.

Q. Which is what—what they are going to pay—what they would be willing to pay for, is that corrrect? What they like is what they are going to pay for?

THE COURT: Probably his cost is involved too in purchasing the service.

[696] A. Yeah.

BY MR. ZAKRZEWSKI:

• • •

REDIRECT EXAMINATION

[697]

BY MR. SAYRE:

Q. Mr. Blount, may I ask you one additional question? Is the Community Communications Company a member of the association?

A. Yes, they are.

Q. How many companies—how many systems does the Community Communications Company have to your knowledge?

A. To my knowledge, about a half a dozen.

Q. Are they representative of the types of systems that are members of the association?

A. Yes.

Q. Throughout the State of Arkansas?

A. Yes.

MR. SAYRE: No further questions.

THE COURT: Mr. Blount, does every company have original programming in the State of Arkansas?

A. I have to qualify my response to that by saying that those cable systems which have the equipment and the facilities—

THE COURT: That wasn't my question.

A. No, sir, they don't. Not every system does.

THE COURT: Anything else?

MR. SAYRE: One question on that.

FURTHER REDIRECT EXAMINATION

[698] BY MR. SAYRE:

Q. Original programming would include, I believe, community bulletin boards and those types of things. Do all systems have those types of—

A. (Interposing) I don't know of any system that doesn't have something of that type.

* * *

JIM GUY TUCKER, a witness called in behalf of the Plaintiffs, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address for the record, please sir?

A. My name is Jim Guy Tucker, 1000 Savers Federal Building, Little Rock.

Q. What is your professional employment, please sir?

A. I am an attorney at law, and a partner in the firm Mitchell, Williams, Selig & Tucker. I am also Chairman of the Board of Cable Vision Management, Inc., a cable television operating and management company with approximately thirteen thousand subscribers in the states Arkansas, Florida, and Texas. I also serve in my individual capacity as a general [699] partner of County Cable Limited Partnership, an Arkansas limited partnership, with approximately sixty-three hundred subscribers in Shannon Hills, Alexander, Bryant, Sherwood, Beebe, and the unincorporated portions of Pulaski and Saline County, although portions of our system have now been annexed by the cities of Little Rock and North Little Rock.

THE COURT: You didn't love that portion of your system though just because of the annexation?

A. No, sir.

THE COURT: Proceed.

BY MR. SAYRE:

Q. Is this County Cable Limited the system described by Mr. Blount as one of the cable system operators in Pulaski County, Arkansas?

A. Yes, we are a member of his association, and we operate in Pulaski and Saline County.

Q. Would you state for the record please your educational background?

A. I have a B.A. degree in Government from Harvard College.

THE COURT: Unless it has to do with cable, it doesn't make any difference.

A. I'm an attorney at law.

THE COURT: That's good enough.

BY MR. SAYRE:

Q. Have you served as Attorney General for the State of Arkansas?

A. Yes, I have.

Q. And a member of Congress from the Second District?

A. Yes.

[700] Q. You are presently engaged in private practice?

A. Yes.

Q. And in both of your governmental and private practice, you were aware of First Amendment to—the Federal Constitution's right to freedom of speech and freedom of press?

A. Yes, I have also done a—in that connection, a part owner and successful applicant for licenses from the Federal Communications Commission for FM radio stations, and originally was a part owner of Channel 16, a local independent television broadcast company.

Q. With regard to your cable t.v. experience, would you explain to the Court how you began it and when?

A. We began in August of 1983 building an area of northwest Pulaski County generally surrounding the Cityof Maumelle where no cable television existed, and have generally spread out since then. Typically, our services were placed in areas that had such a thin population that larger cable companies in nearby cities couldn't economically justify serving those areas as a small enterpreneurial type company, we could justify the construction costs and servicing of those areas. So, we went where other cable companies generally, for economic reasons, were not able to go, and starting in that small cluster, have surrounded the city and moved to the other areas that I have named.

Q. Were you personally involved in the financing and construction of those systems?

A. Yes, as an individual general partner in business, it has been my responsibility to obtain financing, make construction decisions, or [701] approve construction

recommendations, and make decisions on programming, and to approve or disapprove programming decisions. I hasten to add, I did that we a good bit of input from my wife, but we do make the initial decision as to what will be broadcast on the cable television systems which we operate. We operate those systems in Arkansas from five separate what are called headends, h-e-a-d-e-n-d-s. At each of those headends, there are cable television signals received through the dish which we are all familiar with out in the yard, or a combination of those dishes brought inside the system, and then retransmitted to the various subscribers.

THE COURT: Are they amplified or anything?

A. Yes, they have to be amplified and refined, and then along the line, approximately every mile or so, we have to have an amplifier, which keeps the signals up, very much like you would need to keep up pressure in the garden hose if it was too long. We have approximately three hundred and fifty miles of cable plant in the state.

Q. What services are offered on your systems?

A. Well, for those familiar with the Little Rock system, to which I am a subscriber of the Storer here, our system is essentially identical to the programming on Storer. We offer a basic program, a basic subscription, which contains approximately twenty-six channels of news, weather, and distant signals. For example, we carry WTBS, the Super-Station out of Atlanta, which not only has movies. It also carries news and the typical things a broadcast station, television station carry. We also carry WGN. We carry CBN—

[702] THE COURT: (Interposing) Chicago?

A. That's Chicago, that's correct, and the Chicago station is one of the stations we carry for a couple of reasons. One, it is a good entertainment value, but it also has a news

program format that comes on at about Nine O'Clock at night, which is an off hour when news is not otherwise available on broadcast television here. We carry Cable News Network and CNN Headlines News, C-Span. We carry the weather channel, which is not just a little rotating thing, but a twenty-four hour weather broadcast of weather conditions around the country. Some religious programming, and a financial news network, the arts and entertainment—

THE COURT: (Interposing) ESPN?

A. Yes, ESPN, which is primarily a sports network, and a typical cable package for basic. Then, in addition to that, we have a pay of Cinemax, HBO, Showtime, The Movie Channel, and the Disney Channel, which are ala carte services. We have made the editorial election to offer those as programming on our system. A subscriber makes the editorial decision on whether or not he wants one of those particular programs. We also offer on all of our systems south of the river something commonly referred to as pay-per-view. We do this through an addressable cable system, as it's called, and by that, I mean a subscriber can telephone our office and ask to see a particular selection of movies that are available on the satellite that week. We can take that particular movie off of the satellite and send it directly to that subscriber's home without sending it to all homes in that part of our system. So, in that case, the subscriber is asking to see a particular movie, or sports event, or [703] musical entertainment, or whetever it is, and we are sending it to that home, and theoretically to no other home.

THE COURT: How does it work?

A. It works through a capacity at our—a computer in our office, as well as a converter in the customer's home. The computer in our office is able to address and talk to, if you will, electronically the converter in the customer's home, and it can send that signal in a discriminatory manner strictly to

the converter that recognizes or is addressed by the computer in our office. Technologically, it's interesting that we provide that same service from our Shannon Hills office to our Texas system by phone lines. So, if someone at DFW Airport wants to watch Beverly Hills Cop, we send it to them from our little office out in Shannon Hills through this same addressable mechanism. But, the customer is making the election to see that. We make the election to offer that service. It's not something anybody forces us to do, and, indeed, none of our programming is forced upon us by anybody. As the cable owner, we decide what we will offer. For example, we elected not to offer the Playboy channel, and that was our editorial discretion in our system that we didn't want to offer it. So, we don't, and nobody can make us offer it. City councils can't make us offer it. The Quorum Courts can't make us offer it. We offer it. Now then, if somebody comes in and leases a channel from me, and I lease that channel to them, which I am required to do if I have channels available, I can't mess with what they put on that channel. Once they have the right to be on the channel, as long as they are complying with copyright laws and other—

[704] THE COURT: (Interposing) Obscenity laws.

A (Continuing)—obscenity laws and things like that, I can't say, "well, I want you to shorten that movie by thirty minutes." If HBO broadcasts a movie, and I would like for it to get over sooner, I can't interfere with transmission that HBO is sending them, and that's the provision of the National Cable Communications Act that counsel for the state was referring to. I am prohibited from interfering with matters once I have elected to put them on my station. Now, I can decide to stop carrying something too, and, indeed, some cable companies have done that, and PTL is a good example, where you just get fed up with the fund raising efforts or some of the material in something, and you elect not to carry it any longer. But having elected to carry it, I can't interfere with it's content once it's on there. Somebody said one time, "one man's fiction is another man's propaganda", and even a

movie may be expressing a political viewpoint or some other social viewpoint. You shouldn't mess with it once it is on there. We also carry, as part of our basic service, original programming. Our programming is much more limited than that which I know as a subscriber of Storer—that Storer provides. Storer has a vastly more sophisticated original broadcast operation than we do, but even in our small operation we do a number of things. For example, last year up at the Bryant—I believe the Bryant High School wanted to put on a news program, and Dwight Harlan, our Assistant Manager, invited them to use our channel, and so the high school students did a news broadcast from our headend of the community news down there in the area of their high school. We exercised no role in what they said, but we made that [705] available for them to express the news as they saw it. But, we also have a rolling-type community thing, such as Mr. Blount described, and that has everything from advertisements for things to sell to personal greetings, birthday greetings. Some people like to listen to police radio. So, one of our channels carries—we went out and bought a bear cat radio and hooked it up to the thing. People who like to listen to police radios can listen to police radio calls with a video overlay of local news. In Beebe, we have a two-way system, which is available to the college, to City Hall, and to the high school. None of them have put it in use yet, but it is there, and we put it in the system so if they want to do a direct broadcast, they can do so. It was not a requirement of the franchise, but it was an election we made to help make the system more attractive.

THE COURT: The election of the franchise or the franchise—that's a contract matter between you and the government entity.

A. That's correct.

THE COURT: That's not a requirement. That's contractual.

A. That's correct. The franchise is granted to us by the particular governmental authority, and it is granted so that we have the right to be on public rights of way. Were it not for the need to utilize a public right of way, I do not believe any franchise would be required, and that's why you have SMAT-V systems. SMAT-V systems are typically those systems which operate totally on private property, and because they need no access—since they are on private property—to public rights of way—

THE COURT: (Interposing) Such as Holiday Inn's, and places [706] like that.

A. Exactly. They don't need a franchise. But once you start crossing public streets and alleys and rights of way, you do. We are both on telephone poles—I say telephone, AP&L, First Electric Co-op, Southwest Bell. We are also buried in public rights of way, just as Storer, and this would be typical for all cable television companies. And at one time, the position was taken that you could not—you know, if a city wanted to prohibit more than one franchisee from coming in, they could do so. Cases in the last couple of years, particularly Preferred Communications case decided two years ago, I guess, have more firmly established the First Amendment rights associated with the right to be able to be in that public right of way unless there is some burden placed on the public by the presence of the system there. So, our franchise strictly goes to the right of way use and establishes some public standards, insurance, and so forth for what we have to carry in the way of insurance if we are going to be in that public right of way.

Q. Mr. Tucker, there are broadcast signals—wireless broadcast television signals broadcast in the area of which your franchises exist?

A. Yes, there are. We have the—what is known as Channel 2, the Arkansas Educational Network: Channel 16; and then the networks channels of 4, 7, and 11; in addition to

Channel 38 is received in some areas of our cable system. We receive all of those signals into our cable system, and rebroadcast them through our cable system.

Q. Must you carry them in your system?

A. No, we would not be required, and, indeed, the—what's known as the [707] "must carry rule" has been one of the areas of contention between the cable industry and the broadcast industry. How many signals do you have to carry that are off-air, and that issue is in a state of flux right now. But, generally the position, as I operate my cable company, is that I am not required to carry all of the broadcast channels I carry. Now there have been FCC rules in place that some other witness may be more familiar with. I am familiar with one aspect of it. If I put broadcast channels on my cable, which I do, and someone wants to be able to receive a broadcast channel that I am not carrying, I do have to provide them what's known as an A/B switch, which allows them to switch out of my converter and pick up the off-air on their home antenna without interfering with it. So, I must protect their access to that right.

Q. What is the average monthly bill for your subscribers?

A. We average about Twenty-three Dollars and Ten Cents per month in our system at the present time.

Q. Is your systems charges—is the system price sensitive?

A. Our experience—my experience since 1983 is that our subscribers are highly price sensitive. If we, for example, do a rate increase, I may see an increase in my average bill for about a month as a result of that rate increase, and I will then see a drop in my revenue back down to about that Twenty-three Dollar and Ten Cent level as the customer either sheds services—for example, drops one of his pay

services—or else I have customers simply stop taking cable because I went over a magic line that is in their gut and in their mind as to how much they are going to pay for the information they receive over cable, and our experience in our company [708] has been that it's quite price sensitive. It does seem to stay up with inflation, but that's about all.

Q. With regard with the inquisition of the sales tax beginning July 1st, h[illegible] any of your systems experienced cancellations because that imposition of the tax to your knowledge?

A. We have had customers who have specifically cited the sales tax as the reason for their dropping cable services.

Q. The litigation you spoke of with regard to cable television has to do with the mandatory access rules, the "must carry" regulations, these types of things. There has been a tremendous amount of litigation in the Federal Courts over the last ten years—fifteen years, over cable television, has there not?

A. Yes, that's correct, and probably the case that really got, in my view, the ball rolling on analysis of cable and First Amendment rights had it's inception out of Little Rock, Arkansas. A company called Midwest Video, which George Morrell was president of and operated from the Tower Building down here, challenged some of the regulations being imposed on content of cable television. The Eighth Circuit, in a case I'm sure all the briefs will cite, affirmed the cable television operator's right not to have people interfere with his programming, and likened cable television to newspapers in terms of their content. I hasten to say not all Courts have made the same analogy, but at least in the Eighth Circuit—it's been the view of the Eighth Circuit analogized cable television with newspapers.

Q. What are the cable television operators activities that are protected [709] by these First Amendment rights of free speech and free press?

A. Well—

MR. ZAKRZEWSKI: (Interposing) Your Honor, I'm going to object to him answering that. That's a legal conclusion.

THE COURT: He can have opinion. I don't have to follow it, but he is certainly entitled to an opinion.

MR. ZAKRZEWSKI: I don't think it's evidence—

THE COURT: (Interposing) He hasn't been qualified as an expert, but that doesn't have anything to do with it. He is entitled to have an opinion on it himself. Proceed.

MR. ZAKRZEWSKI: I object.

A. I'll speak as a cable operator and a cable viewer, and based on my experience also as an attorney in this area, I feel very, very strongly about the fact that the business we operate is very much like a newspaper or magazine. We have these channels out there that are available. We can put as many as—we could put as many as a hundred channels on. Our system currently carries thirty-six channels. We can easily upgrade to over fifty channels. We have a wide selection of programming on there, and as the owners of the system, we make the decision as to what's going to be on those channels. Now obviously, our decision is governed very heavily by the subject matter that we believe our viewers are interested in, and if we have viewers clamor for a particular program—for example, we had them want Channel 38 carried, because I think that is the channel that carries the St. Louis Cardinals games, and that was important to them. They wanted to see it. We've had people demand certain religious [710] programming they wanted to see, because they otherwise could not have access to it. But, we have the final say so, and we try to be responsive to our viewers just very much as newspapers, and I guess, broadcast television stations try and adjust their

programming and their newspaper format to that purpose. It has been my view that no one has the right to restrict what we carry, or to insist that we carry things with a possible exception of this area carrying some broadcast signals. There are some other public policy reasons involved in that. But, certainly outside the broadcast signals themselves, our right, and my view of our right, and my strong feelings about our right is that nobody can tell us what we can or cannot carry, or should or should not carry; that in the spirit of free enterprise that is applicable to newspapers and broadcast television, we carry a smorgasbord of what we believe our viewers would like to see and would find of interest, and we try and have a wide diversity of programming available.

Q. You indicated that you believed that your cable system competes with newspapers. Would you be specific in examples of what you—how you compete?

A. Competition with cable is focused, I think, in a number of areas, but I will pick two where it is most noteworthy, Newspapers is one. There are many—I think it is a well accepted fact that people don't just get their news from newspaper reading, but there are days when I can't see the newspaper or read the newspaper, and I go to CNN, CNN Headline News, or WGN-9 for my news content, and it's my experience that a heavy number of our viewers [711] rely for news information on the signals they get over cable television, and not on newspapers or something else. But newspaper is a clear alternative to them for that same news content, perhaps presented in a different format, but they can read about the activities in the—off the coast of Iran in the newspaper, or they can watch it on CNN, or WGN Channel 9, or WTBS, and that's a choice they can make, and it's a competitive factor. In terms of broadcast television, it is a highly competitive factor, because broadcast television not only carries news, it also carries a wide range of other entertainment that is directly competitive with cable, and if people think our rates are too high, they will just switch to broadcast television. Satellite programming also competes

with us directly. People who have private back yard dishes can receive signals off the satellite that are essentially identical to what we receive and retransmit. If they want to invest in the satellite dish, they do get a descrambler, but we are a retailer, if you will, of that program. For example, a satellite dish operator, or rather owner, can come to our cable t.v. office and subscribe to HBO, and we will do the billing for them, and they will pay us, and we will forward the money to HBO. Now, that's not a cable television service I am providing, it has—you know, they are not getting any signal from me. I am simply serving as a gathering point for HBO on the revenues, and I bill them Eight Dollars, which is less than I bill my cable customers, because I don't have as much overhead associated with that task, but they can rent it from me, and I will take care of all the billing on it. The—

Q. (Interposing) Excuse me, Mr. Tucker. With regard to that particular [712] transaction or retailing of that particular service, HBO, Cinemax, whatever the premium channel is, do you have an obligation to service the decoder or to do any other function for the—

A. (Interposing) We will sell them the decoder, and if we sell them the decoder, we will provide service to it, and we'll also provide service to the dish. Again, it's not a cable television service, it's just—

THE COURT: (Interposing) You're in a business.

A. Yes, it's just a separate business we do.

Q. When do you make those billings, your County Cable would not impose a sales tax on that particular transaction?

A. The recipient of dish services that we—whether we are providing support service for it or not—does not pay sales tax on that service. If he gets the same service over my cable, he'll pay a sales tax. Now then, whether or not I am supposed to pay a sales tax on the HBO revenue I collect for

that dish owner beats the heck out of me. I don't know the answer to that right now. It's not a cable service. So I don't think it is subject to the sales tax, but I honestly don't know. What I do know is that the satellite dish owner can receive exactly—essentially the same programming that I am providing, and his providers don't pay any sales tax on it, and I do pay the sales tax on what—or my customers pay a sales tax on what they are receiving from me.

Q. As a cable television system operator and owner, would you tell the Court why you have objected to the imposition of sales tax upon the service you provide?

A. I recognize the government has revenue needs, and we certainly don't [713] mind paying to support the governmental structure that exists in the state or in the country, and we think that's a duty of all systems, and I think every cable television operator feels that way. And, we do pay franchise fees that are rather substantial; three percent of our gross revenue. The—but the tax that's been imposed in this case is unlike, for example, the taxes that my companies pay in Florida and Texas. In Florida and Texas newspapers and advertising, which supports broadcast television, are taxed as well as our cable system is taxed, but under the tax adopted here in Arkansas, other forms of First Amendment protected communication, with which I am directly competitive are not taxed. So that if you are a cable television customer, you're being assessed a tax. If you see the same thing on broadcast television, which I rebroadcast, you don't pay a tax. If you read the same story in the newspaper, you don't pay a tax. If you get it on your home satellite dish, you don't pay a tax. So, I think there is a—I feel there is a direct discrimination that occurs as a result of the structure of the statute, and it discriminates between the communication that my company provides, and the communications being provided by these other entities with which I am directly competitive. We pay the tax, and they don't pay the tax, and that seems the very heart of discrimination.

Q. Thank you, Mr. Tucker.

MR. SAYRE: I pass the witness.

* * *

CROSS EXAMINATION
[714]

BY MR. ZAKRZEWSKI:

Q. Mr. Tucker, I would like to talk with you a minute about who you do compete with, and you testified in length that it is your feeling that you primarily compete with newspapers. Do you have any figures or studies that show the relationship between cable t.v. and newspapers that would indicate how you compete with them and how y'all are labeled?

A. No. I should say I don't believe I said I primarily felt I competed with newspapers; that that was one of the entities wich whom we compete, and I speak not only as a cable television operator and owner, but also as a cable television and newspaper subscriber. That is, personally, when I go in to make a decision on how I am going to get my news, I can get it from newspaper, or I can get it from radio. My children can read the comics in the newspaper. They can also watch the comics on television. They can read general interest articles in the newspaper, or they can watch general interest articles on television. So, I speak from personal experience, plus my own perceptions as a cable t.v. owner and operator. I have no statistical figures to support that with.

Q. And from that same point of view then, do you own a VCR?

A. Yes, I do.

Q. Do you ever go and rent a movie?

A. Yes, I do.

[715] Q. Do you think that you compete with the folks that rent those movies when you show movies on cable t.v.?

A. Some of—some of our programming is unquestionably directly competitive with video tapes. No question about that.

Q. How about going to the movies? Do you and your family go to movies?

A. We go to movies and I—movies do not seem to have an impact on our—speaking as an owner/operator, movies do not seem to have an impact on our cable television subscribing. As a—speaking as an individual, I don't think I would choose between having cable or having video tape. I might mix the two together, but I don't choose between them.

Q. I'm speaking of going to the movie theatre.

A. I'm sorry. I don't choose between having a movie theatre or subscribing to cable television. I might do the two together, but I wouldn't give up cable to go to movies, because cable—the movies don't have the news, and the sports, and the firing line, and C-Span, and that sort of thing. So if you restrict it just to the movie content of "Beverly Hills Cop" or maybe "The Living Daylights", which I went to see the other night, I might go to the movie now instead of ordering "The Living Daylights" on pay-per-view for my system in the spring.

Q. But, looking at it from the other side, from the movie theatre on the other side, don't you think there is some competition between them and that somebody might choose to have cable t.v. and pay for that rather than go to the picture show?

A. I don't know what the movie theatre owners would think.

Q. As an individual, if you didn't have enough money to choose to do [716] both, don't you think there would be some competition between you and the movie theatre—between you cable service and the movie theatre?

A. I would have to speculate on that. I would hope they would choose cable if that's the case.

Q. Well, we've done lots of speculating. I would ask you to speculate.

A. All right, what do you want me to speculate on?

Q. If you didn't have all the money to spend that you got, don't you think that would be a consideration as to whether you went to a movie or whether you had cable t.v.?

A. I certainly think cable t.v. is a better value than the movie theatre.

Q. I would agree with you, and I have had to make that choice and have made it in the past. But so from that standpoint, it would be pretty obvious that you would compete with theatres, is that correct?

A. From the standpoint of—

Q. (Interposing) From the standpoint of an individual having a choice to make, then cable t.v. and movie theatres are competing. They are competing for that persons dollar, aren't they?

A. I can agree as to video tapes. I really can't agree as to movie theatres in my view.

Q. You don't think that you have had any impact on the attendanceship at movies?

A. I think people go to movies for a different reason than just seeing the entertainment. They are getting out of the house. There is the popcorn and a certain social event to it. It's more like going—I think [717] going to a ball game or something like that. It is an out of home entertainment opportunity, and I, personally, do not equate the two as being competitive. Someone may have some statistics that show differently, but I don't see them that way. Video—home video tapes, I do.

Q. You don't think you compete with the ball games?

A. Again, I think the—one is an information and entertainment media delivered to the home, and ball games and movie theatres both represent out of home activities. Now, to the extent that everything competes for every dollar all of us have, because we have a wide range of options, you can say "yes, there is competition", but I can't equate ball games and movie theatres with the kind of competition that we receive, for example, from video tapes.

Q. Let's relate it to a specific example. Do any of the stations on your system carry Razorback football games?

A. Yes.

Q. Do they ever black those games out when they're played in the city?

A. I think sometimes Razorback games are played in the city that are broadcast in other areas that we don't have available here, yes.

Q. And why is that done? Do you have any idea?

A. I think it has to do with the contract protections that the people who buy the rights to the football games have. That is, usually in their contract, they prohibit showing the game locally.

Q. And, why would they want to do that?

THE COURT: Fill up the stadium.

[718] MR. ZAKRZEWSKI: Your Honor, I would ask him to answer that.

A. I would assume that it—

MR. ZAKRZEWSKI: (Interposing) I appreciate your answer, and agree with it, but I would ask him to answer it.

A. I didn't hear the Court's answer. It might have—

THE COURT: (Interposing) I said fill up the stadium.

A. I assume it is some type of economic interest. I don't know that they get—I don't really know who imposes that restriction, whether it's the people who are broadcasting the game, or whether it's the people who own the stadium, or whether it's the University of Arkansas.

THE COURT: It is the University of Arkansas. You may show our game, but only certain places, or we won't let you have a contract to show it.

BY MR. ZAKRZEWSKI:

Q. So, you don't really think you compete then with the theatres and athletic events?

THE COURT: You know, I don't know where this question goes in terms in light of the question before the Court?

MR. ZAKRZEWSKI: Well, Your Honor, they've put on substantial that he compete—or attempted to put on evidence that he competes with newspapers to show discrimination, to show a reasonably likelihood of prevailing, and what I'm going—my next question maybe will show where it's going.

BY MR. ZAKRZEWSKI:

Q. Mr. Tucker, are you aware that the rental of a video tape is subject [719] to sales tax?

A. I've been told that, and I think I pay a sales tax when I rent one, yes.

Q. And that a rental of a VCR is subject to sales tax?

A. I never rented a VCR, but I would assume that.

Q. Are you aware that the price of admission to a movie theatre is subject to sales tax?

A. I wouldn't be surprised, but I don't know that.

Q. And that admission to an athletic event is subject to sales tax?

A. I assume that's the case.

Q. And, Mr. Tucker, you explained to us your reason for disliking it is the discrimination and that you don't mind paying taxes. Does the utility pay any other ta t—I mean, does the—do y'all pay any other taxes other than the franchise tax that you mentioned that you are aware of?

A. We pay income tax, and use tax, property tax.

Q. How are you taxed for property tax purposes? Are you aware of that?

A. Yes, there's an alternative method of calculation. It is calculated by the State Public Service Commission. It can be based on value of the assets, as well as on your—the value created by those assets through receipt of revenues, and it is then in turn tied to the millage rates in each of the local school districts in which we operate.

Q. Is that rate higher, lower, or the same than rate of other businesses that operate in the area?

A. I think the approach to it is essentially identical across the board. It is somewhat unique in that our property tax is calculated by [720] the State Public Service Commission staff, even though we are not a utility. So, for example, I don't know how the property tax for Coca-Cola Bottling Company would be determined, and I cannot testify that it would determined in the same way that ours would be. I'm just not familiar with it.

Q. You don't know that it's an advantageous rate. Is that correct?

A. I would—

Q. (Interposing) As compared to other businesses?

A. I do not believe it is an advantageous rate at all.

Q. And, the Cable T.V. Policy Act doesn't prohibit the PSC from regulating you all in any other areas. Is that correct?

A. It's the Cable Communications Policy Act, I think, is the name of it.

Q. Whatever—47 USC 521?

A. Right, and I can get the name wrong too. The Act contains a number of specific prohibitions, including

prohibitions against certain types of taxing of cable television companies, that's true.

Q. Does your company do original programming? Mr. Sayre may have asked you that, but I didn't catch it if he did.

A. Yes, if by original programming you mean, do we originate transmissions at our headend site to our customers, the answer is yes.

Q. Okay, let me get more specific.

A. As opposed to taking them off of the satellite.

Q. Does your company sell—produce programming in that they take content that someone else—that no one else has put into a program form—put it into a program form and broadcast it?

[721] THE COURT: He said the Benton High School did.

A. The answer is yes, we do, and others do sometimes do it for us, and then use our facilities to direct broadcasting, but, for example, all of our direct transmissions on our little rolling thing are—Dwight Harlan goes back there and types it i n, whether it's information about a town council meeting; whether it's a description of the school menu; whether it's an advertisement, or a direction about—sometimes we have to black out for a particular purpose, and we have the right—we have not utilized it at this point—to go do an editorial comment on something, a political candidate, for example, or a community event. We have asked for programming. For example, we asked the Pulaski County Literacy Council to provide us a tape that we could run on their literacy program in the area, because a lot of people who have literacy problems do watch television, and that a chance to communicate. So, the answer is most of our stuff is actually prepared by somebody else or done in our office. It's all been at our invitation, or they've asked, and we've said

sure, be glad to, but some of it is stuff that comes out of the mind of Dwight Harlan or one of the other employees of the company.

Q. Could you give us an example or two of what comes from your people? Dwight Harlan?

A. Dwight Harlan is our assistant manager. Well, all of the—again, on the rolling cable cast there that we have that contains the community bulletin board, Dwight puts—types in all the messages. Now, some of the messages would be a direct message from—"Francine wants to say happy birthday to Judy Lee," but other messages or communications that we want [722] to have with our customers, those typically deal with programming services, or interruptions of services, or materials we are going to be carrying. For example, it's not uncommon for us to tell customers over that about some movies that will be coming up on pay-per-view. That's all done by Dwight, and he decides what he wants to put on, and puts it on it pursuant to the authority he has in management.

Q. How do you—how does your company determine what you are going to broadcast, or what you are going to put on your system, which channels, or which programs on a channel, if you can do that?

A. Well, as to the community bulletin board, we decided in much the same way a newspaper would decide. We decide what to type in, depending upon the needs of communication we have, or the things that we think are important. As to satellite programming we provide, it tends to be a blend of what we think our customers would want to have, and what we are willing to put on there, and Playboy being an example of something we've not been willing to carry.

Q. Do you do any surveys of your own to indicate what your customers want to see?

A. Yes, we have done that on occasion. The—we get a pretty regular survey by virtue of the various substantial communication between customers and what we call our customer service representatives, the people who are on the telephone down there. People call in and tell us they would like to see this program or that one, or they will complain [723] about programming if they it's got—usually it's an objection to violence or sexual content.

Q. Do you ever review programming before you make a choice to put it on or not?

A. Yes.

Q. Would you give us an example of that?

A. We've been solicited by some religious programming and by some cable channels that carry sexually explicit material where we have looked at either excerpts or written material on what's going to be in it, and made the decision we didn't want to carry it.

Q. So, you have actually then refused people access to your system based on content?

A. People have asked us to carry their programming, and based on content, we have declined to do so. That's distinct from someone who wants to lease a channel from us. The people who want us to contract, want us to pay them to carry their programming. That's the way it works. For example, WTBS, I think our rate right now is around Fifteen Cents per subscriber. Every subscriber we have, I pay WTBS Fifteen Cents for the right to carry them.

THE COURT: Per month?

A. Per month. They don't pay me for the right to be on my cable.

Q. So, it's different then if you pay them or they pay you?

A. Well, the—yes, there is a difference in that.

Q. Other than the flow—the direction of the flow of the dollars. Are you saying that you cannot refuse?

[724] A. If you are referring to the Cable Communications Policy Act, I think you're—and if you're not, I don't know what you are driving at.

Q. You have to understand, first of all, of my knowledge of that Act is very cursory, and that I don't—and it's based on reading, which you can understand, I'm sure, doesn't tell me much about how the thing works practically.

A. If—if—once HBO has entered into a contract with me to provide programming over my channel, I may not go in and interfere with their program content. There are two reasons I may not do so. One, is the Cable Communications Policy Act, and probably other Acts that prececed it, and the other are federal copyright laws, which would prohibit my inference with it. The same would be true with the other channels that I carry that have copyright protected material. If someone leased a channel from me, and we have had had a chennel leased from us in the past. It was a channel that was leased from us in Beebe, and we charged the—in this case, it was a church group that wanted to lease the channel, and we charged them a flat fee for leasing that channel, and we exercised no discretion over what they had in there after we leased it to them, other than to be sure that they complied with copyright laws, because we can incur personal liability in that case.

Q. So once they've leased it from you, then you don't control what they put on it, is that—is that what you're saying, in essence?

A. I believe I am prohibited from attempting so censor or control the content other than where it would interfere with the law, of people who lease channels from me.

[725] Q. Is the—are the terms of that lease, when you lease a channel, are they controlled by law, or is it a purely contractual matter between you and the lessee?

A. Well, to the extent that you're dealing with—with matters that may not be transmitted under federal law without doing certain things, copyright, or obscenity, or threatening language, or something, it can be controlled by superseding law. Aside from that, I think it's a matter of contract.

Q. Is your company joining in this lawsuit, Mr. Tucker?

THE COURT: What was the question? I missed it.

Q. Is your—Mr. Tucker, is your company—are you—do you intend to be a party to this lawsuit?

A. Well, I hope that we are a party by virtue of the class action request that's been made. I would certainly consider our company, and me, personally, an example of a member of the class.

Q. Your company does operate under a franchise?

A. Multiple franchises, that's correct.

Q. In the franchising system, how many—does the franchise system limit the number of systems that can be operated in an area, or exactly what does—what rights does that franchise give you?

A. The principle right it gives me is access to public rights of way.

Q. Does it give you any—any right to exclusive access to that?

A. No, it does not.

Q. So that there could be another cable t.v. company also given the same rights?

[726] A. Absolutely, and indeed—

THE COURT: (Interposing) Is the franchise a one shot deal, or is it year after year?

A. All of our franchises are—were originally fifteen year franchises with the right to renew for fifteen years, and in seeking all of our franchises, I toldd folks I wasn't interested in exclusive franchise. I thought there were difficulties under the antitrust laws, among other things, with exclusive franchises.

THE COURT: I was thinking about—once you have access to it, do you have to pay every year to keep that access?

A. I have to pay a franchise fee every year of three percent to—which is limited by the Cable Communications Policy Act. A municipality may not charge a rate in excess of, I believe, it's either four or five percent to a cable company, and the reason was some areas were trying to charge franchise fee rates that had nothing to do with the possible expense to the city of use of the public rights of way.

THE COURT: Revenue raising, in other words?

A. I think they were trying to move to a revenue raising sense. That's exactly it, Your Honor. There was an effort to move to a revenue raising mechanism, as opposed to essentially an offsetting cost of use of the public facility.

BY MR. ZAKRZEWSKI:

Q. A couple of final questions, Mr. Tucker. Would you say that your choice of programming is primarily what your customers want to see? You try to determine that, is that correct?

[727] A. I think primarily that's true, yes.

Q. And, that means what you need to consider is you need to show what they'll pay for? Pay you to let them watch over your system, is that correct?

A. I'm sorry. You're going to have to repeat the question.

Q. Well, you're—you're charging them for a service just like a lawyer does. Right? It's just an assortment of services of different services, and you are trying to give them something that they want, and they are willing to pay you for it.

A. See, lawyer services are exempted from the sales tax, I think. So I can't compare it exactly.

* * *

Q. My simple question is, isn't your choice as to what you are going to put on your system dictated by what your customers are willing to pay to see?

A. In part that it would be true.

[728] Q. In large part, is that correct?

A. Well, no, I would say in part that is true. Obviously, I need to provide something they want to buy. If they don't like it, they won't buy it. Like a newspaper or a broadcast station, if they don't like the program content, they won't read it or watch it.

THE COURT: And what you can afford to buy and sell to them.

A. Well, that's the point. There are other considerations beyond what you have mentioned.

Q. But, unlike a newspaper, you don't sit there and give them editorial content that will make them unhappy, do you?

A. Well,—

Q. (Interposing) As a matter of fact—

A. (Continuing) my recollection of the local newspapers are that they daily provide editorial content that will make people unhappy.

Q. That's exactly the point.

A. As well as editorial content that makes them happy, and I think our cable television company is exactly the same. There are people who strenuously object to the material we carry on some channels. They continue to subscribe to cable television, because they want to watch the material on other channels. There are—there are cable t.v. channels which I carry on my system, which I personally find very objectionable, but other people like them.

Q. Are they general access channels or premium channels?

A. No, absolutely not. The—there are—and I'm thinking of some of these people who are constantly out there trying to raise money over my [729] cable t.v. company, and I've got a hesitation about it, and I don't watch those channels personally. But there are other channels that the people, who do enjoy some of these religious channels, detest, and they continue to subscribe to my t.v. because—my cable system, because they like the religious

programming, and in that respect, we are very much like someone who has a magazine. They may read some pages of the magazine, and skip all other pages all together. They look for the material that is of interest to them, and that is—that was part of the original appeal of cable television was to provide this diversity of programming so people would have a wide range of choice that was not available over broadcast television, even where broadcast television was available.

Q. So that you—even with the religious programming though, then you do have another segment that will watch that that might not watch something different?

A. That might not watch—I think, Showtime has movies one night of the week that have a lot of sexual content in them, and I would think that the people who object to that are sometimes the people who like more of the family oriented programming. Some people like to subscribe to the Disney Channel, and they don't want Showtime. Some people like to listen to our Bearcat radio receiver.

Q. How many customers did you have drop your service because of the sales tax?

A. I do not know that, and it would not be a traceable event. I understand, as I testified, that we've had some customers who have specifically objected to the sales tax. It shows up on our bill as a [730] separate item, and it wasn't there before June the 30th. So they can identify it.

Q. How did they express their objection?

A. By telephone comment to the—we have a converter in their home. So when they discontinue their service, we keep a record of why people have discontinued service. We routinely have them, as a matter of the conduct of the business, ask them why they are disconnecting.

Q. And your records will reflect then that this person called, and that his—he had his service disconnected for that reason.

A. There should be—yes, there should be records of however many people there were who specifically cited that as a reason.

* * *

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. One thing, Mr. Tucker, we talked about your signal being within the broadcast—or your system being in the broadcast area, and if the programming becomes too expensive—your programming or cost—they simply cut it off and go back to the other programming. Would you explain to the Court, are your—let me ask you this, are your rates controlled under your franchise agreement? Do the cities or the governmental units set your rates?

A. The—the cities—Beebe, for example, initially in it's franchise, attempted to retain rate control authority; however, the National Cable Policy Act revoked the rights of governmental units to regulate rates. So, they may not regulate them where there is, in the words of the statute [731] "effective competition". Effective competition has been defined by the Federal Communications Commission as that area where there are at least, I believe, it's three off-air broadcast signals within the grade B contour of the cable subscriber. So, for example, in the Little Rock area, where we have at least five off-air broadcast stations, there has been a determination based on the presence of the signal level of three or more off-air broadcast stations. A determination made that our system is subject to effective competition, and because it is subject to effective competition, we have no rate regulation. And that—

Q. (Interposing) So, you—you have the right to set your rates at what the market will bear? It's subject to the marketplace then?

A. That's correct. That's correct.

Q. All right. What about instances in which there is not this effective competition? May rates be controlled?

A. In areas where there is not effective competition, as is currently measured under law and FCC regulations by the number of broadcast signals available, rates may be regulated.

Q. Inn the areas where there is not effective competition, is the consumption of cable services greater than in the areas in which there are effective—there is effective competition?

A. Oh yes, cable television systems were initially instituted, as Mr. Blount indicated, in areas where there were no off-air broadcast signals available, and so for example, in a typical mouuntainous area, sixty or more miles distant from a station from like Channel 4 or Channel 11 here locally, you might see a cable penetration of eighty or ninety percent. [782] There may be some areas down in Southeast Arkansas the same way, and by penetration, I mean the number of subscribers you have compared to the number of homes passed by the cable t.v. plant will be eighty or ninety percent or more of the people there. Now, by contrast, in an area like Little Rock where there is lots of off air broadcast available, we would anticipate a forty to fifty-five percent penetration because of the competition essentially from off-air broadcast facilities. So, whether or not we have competition is measured by the federal government for rate regulation purposes directly by the number and signal strength of off-air broadcast that's available in the area.

* * *

RECROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. So, the effective competiton, according to this law, is the other t.v.—the free t.v. stations in the area? Is that what they are measuring?

A. For purposes of measuring whether or not we will be rate regulated, the Congress directed the Federal Communication Commission to determine whether a—what cable television companies were subject to effective competition. They delegated that authority to the FCC. The FCC has determined that effective competition is measured by the number of off-air broadcast stations in an area generating a certain strength signal level, and if that number and that signal strength exists, then we're subject to effective competition, and no further rate regulation—or no rate regulation is permitted. Now, Congress did not specify the off-air [733] broadcast signal as the competition. It merely said determine effective competition. The FCC determined that the— that rate regulation should be measured on this standard I have described.

Q. What is an off-air broadcast?

A. That would be your network stations, or independent stations. Here locally, it would be Channels 4, 7, 11, 16, and 2. I don't believe Channel 38 has that signal strength here, although I may be mistaken on that. In some markets where we operate, there is ten or twelve or thirteen off-air broadcast stations.

Q. So, it's competition, not so much in an economic sense, but in a—what sense is that in? Do you sell advertising?

A. Yes.

Q. Where do you run it?

A. We run it on cable. We run it both on the channels that have been described in various ways here, but our origination channels and the headend, if somebody wants to—we might say "the Blue Hill Garage has a special on tires this week," and we'll advertise that.

Q. You're talking about my kinfolks.

A. Okay. If we've got a—well, we do not have what's called an "insert capability". We hope to install one. I think Storer has it, where you can actually insert video tapes into the middle of an NFL game, for example.

THE COURT: They do.

A. And you hear a—you may hear a little beep-beep-beep just before certain programming, and that is a computer signal to that device, which [734] triggers a local insert on the thing. So, yes, we do sell advertising.

THE COURT: Does this satellite give you breaks in those systems?

A. The programmers do, yes.

THE COURT: I assume they charge you for that right then?

A. Well, they pay us, because—the advertiser is paying us.

THE COURT: I understand, but what I'm saying is, if on CNN you get the three beeps and then comes Bale Chevrolet's advertisement—

A. (Interposing) There is compensation made for that between the advertiser and the cable company and—

THE COURT: (Interposing) CNN?

A. CNN.

THE COURT: That's what my question was. Proceed.

BY MR. ZAKRZEWSKI:

Q. Okay, then do you have any studies, or are you aware of any studies—I'm sure you don't have the figures—but would relate revenues that are attributable, or compare rates between people who subscribe to your service as opposed to people who subscribe to a newspaper or one of your other competitors, and the effect of a rate increase on one or the other?

A. No.

Q. As they relate to each other?

A. No.

Q. Okay.

THE COURT: Are you taxed on your advertising you sell and those services?

[735] A. I don't believe—if I am, I haven't been paying it. I am not aware of an advertising tax in the state.

THE COURT: I was just asking.

* * *

PAUL GARDNER, JR., a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address please, sir?

A. My name is Paul Gardner, Jr. I live on Highway 81 North in Monticello, Arkansas.

Q. Are you the owner or one of the owners of Community Communications Company?

A. Yes, I am.

Q. And, would you explain to the Court what Community Communications Company is?

A. Community Communications Company is a family held corporation located in Monticello. We operate six cable systems out of our Monticello office.

Q. How long have you, personally, been involved in the cable business—[736] cable television business?

A. Our company is a family held corporation. We went into business in '72. At that time, I was president of our corporation. About six years later, I took over complete operations of our company.

Q. You've sat in the courtroom and heard Mr. Blount and Mr. Tucker testify to the operation of cable systems in Arkansas.

A. Yes, I have.

Q. Do you agree with their characterizations? Are there any differences in your system that you feel that were not touched on by those two witnesses?

A. No, sir, we carry pretty much the same operations. We do operate a broad spectrum of systems, I guess. We have—our largest system has about three thousand subscribers, which is Monticello. Our smallest system has a hundred and nineteen, which is actually the two towns of Tiller and Reed. So we have other systems that are in between that subscriber size.

Q. In the city of Monticello, is Community Communications Company's television services subjected to more then one local sales tax?

A. Yes, sir, we have a county sales tax, and we just recently passed a city sales tax in the city of Monticello.

Q. So, you are required to collect a six percent sales tax?

A. Effective the first of August.

Q. What capacity do you hold in the Arkansas Cable Television Association?

A. I was elected President of the Arkansas Association this year.

[737] Q. Did the—the Association is a party plaintiff in this action. Can you tell the Court how the Association decided to bring this suit—to be a plaintiff in this suit?

A. We, after deliberation, felt like it was an unfair tax that we had been singled out from among the other mass communications media, radio, newspaper, television, and so forth.

Q. Did the board of directors of this association vote to institute this action?

A. Yes, sir, we had a couple of meetings, and then decided we should take this action.

• • •

Q. Do you consider that the company's six cable systems that it operates in your area of the state to be representative of the types of cable systems operated by other cable system operators in the State of Arkansas or typical?

A. Yes, sir, throughout the State of Arkansas, I think we have a cross-section of all of them.

• • •

CROSS EXAMINATION

[739]

BY MR. ZAKRZEWSKI:

Q. You stated that you compete with regular television stations?

A. Yes, sir, we have public access or regular television stations in our area, yes.

Q. And that the sales tax discrimination between you and the t.v. stations?

A. It's a form of entertainment that—(pause)—

Q. You sell advertising just like Mr. Tucker?

A. I have character generators available in my systems, yes.

Q. Do you pay sales tax on that when you sell it?

A. I have not been charging sales tax on the character generators.

Q. I don't understand how you think the sales tax hurts your competition with t.v. They don't—they are not charged on their advertising, and you [740] are not charged on your advertising. How will this effect your ability to compete with them?

A. I'm not sure I understand.

Q. Well, the only thing I'm aware of that you two do in common is you broadcast signals, and—but as far as economic discrimination, the only thing y'all do similar is you charge for advertising and they charge for advertising. That's the only—and neither of you are taxed on that. Is that right?

A. Right. Well, people don't have to subscribe to our service. They can receive those off-air channels in our area off the air.

Q. That's correct, but I don't see how you see that the sales tax effects your ability to compete with them, because they get them free anyway. Right?

A. Right.

Q. And they are willing to pay you to broadcast it to them in addition to the other services, and all this is going to be is an additional percentage on that price. I don't see how it effects your ability, or changes—changes your competition with them? Can you—I just don't understand how it does that. Can you explain that?

A. No.

* * *

[741] *JERRY BRYARS*, a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address please, sir?

A. Jerry Bryars, 34 Hummingbird Lane, Conway, Arkansas.

Q. And what is your professional employment please, sir?

A. I am Executive Vice President of operations for TCA Management Company for the State of Arkansas.

Q. Would you explain to the Court what the TCA Management Company is?

A. We are a MSO, or Multiple System Operator, that operates in Arkansas

[742] THE COURT: What does TCA mean?

A. It's abbreviations for Tell Service Corporation of America. I'm sorry. I misunderstood the question.

Q. No, I think that's—you said it is an MSO, and this is a terminology, Multiple System Operator, meaning that you operate more than one cable system?

THE COURT: I just grew up speaking English. I don't speak in anachronisms.

Q. But, the—how many systems does TCA operate in the State of Arkansas?

A. We have eighteen office locations, and a great number more franchises than that in the state. Somewhere in the neighborhood of fifty franchises.

Q. So, those owuld be fifty separate systems?

A. Right.

Q. Does TCA operate similar multiple systems in other states and localities?

A. Right. Texas, Louisiana, and Idaho.

Q. And, it would be considered nationally a large Multiple System Operator, or a large cable company?

A. I believe we are ranked thirty-first in the United States.

Q. You have served as an officer of the Arkansas Cable Television Association?

A. Yes, I was President last year, and I now serve as past President/Board of Directors.

[743] Q. As a member of the association and as a cable system operator or manager, you have heard the testimony of Mr. Tucker, Mr. Blount, and Mr. Gardner here today concerning how their systems operate.

A. Right.

Q. Is there any substantial difference in the way that the TCA operates its multiple systems in the State of Arkansas?

A. We operate basically the same.

Q. And offer the same type of services?

A. Same type of service, yes, sir.

Q. Are some of your systems—you say fifty to sixty—in remote areas from broadcast signals?

A. Well, we operate basically all over the state. So we have systems as far north as Corning, Arkansas, which is, You know, pretty remote as far as from the Little Rock channels here.

Q. Do you supply Little Rock broadcast television signals to those remote locations?

A. Yes, sir, we do.

Q. Generally, through what form of technology?

A. Well, as far as Corning and Pocahontas, up in that part of the state, we serve the Little Rock channels through a microwave system, where we pick those signals up from the Jonesboro cable system, send them through a microwave hop to Stanford, split it there, and serve the Corning area and also the Pocahontas area. We also serve the Harrison area—Harrison, Berryville, and Green Forrest—through a microwave system where we pick signals up—Little Rock signals up in Mt. Judy, beam them from there to [114] Harrison through a microwave system, and also from there to Berryville through a microwave system.

Q. So, this microwave system can be used to transmit the signal around the state?

A. Right.

Q. As opposed to the satellite transmission?

A. Right.

Q. Is there a local microwave transmission similar to cable systems, or was there, at least in the past, a technology used in that same manner?

A. There are systems such as direct broadcast, which is a microwave system that you can do a number of services like HBO or something like that where you just beam it from a given location to—right direct to the subscriber's house.

Q. And the antenna—there has to be a specialized antenna for that?

A. Right.

Q. What would be the cost of that antenna?

A. I'm—we've never gotten into that particular part of the delivery, and it would just be pure speculation on my part to answer that.

Q. With regard to the delivery of the HBO services from the microwave transmitter, or broadcast transmitter, to the individual homes, as opposed to the cable delivery of HBO, what would be the difference with regard to the—to the signal received—I mean, the picture received by the user? Would it be the same?

A. To the best of my knowledge, it would be none. One is broadcast or transmitted cross country. The other comes from satellite.

[745] Q. The only difference would then be the one that is connected by cable, and the other one would be transmitted directly to the home by a microwave system?

A. Right.

Q. The—using the wire or the cable, you can actually under present technology put in more channels than you can by the microwave system?

A. You are limited with the microwave because of the higher frequency that the FCC allows you to use on the microwave part of it. Using a coaxial cable, you use a much lower frequency. So, therefore, you can stack a lot more channels into one given frequency space. So, you know, you can go on up into fifty, sixty, up to a hundred channels or so going through a coaxial cable.

Q. So, it's virtually unlimited, except for the size of the cable?

A. Right.

Q. As a member of the association and as the manager of the TSA operation here in Arkansas, did you vote positively to bring this suit?

A. Yes, I did.

Q. And what were the reasons you did that?

A. We felt like it was a discriminatory tax since it was—we're part of—we feel like we're part of the news media. Radio and t.v. broadcast signals are not taxed, and—

Q. (Interposing) What about newspapers and magazines?

A. Newspapers and magazines are not. We are part of that service also. We feel like we are.

Q. (Interposing) What about the—excuse me, the satellite broadcast [746] directly to the dishes?

A. Well, they are a part of that same service.

Q To your knowledge, are they taxed? Those services?

A. No.

CROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. Who told you that magazines weren't taxed?

A. Well, there has been a lot of scuttle about the Arkansas Times.

Q. So, that's—you didn't know that if you go into a store and buy a magazine, don't you pay sales tax on it there?

A. Well, yeah, I'm sure you do on some—some magazines.

Q. What about movie theatres? Do you compete with them?

A. I wasn't aware that they were taxed. That was news to me.

Q. How about the folks who rent video tapes? Do you compete with them?

A. I was informed that they were taxed, yes. I, personally, have never rented a video tape.

Q. Do you compete with those folks?

A. Yes, we compete with video tapes. Yes, very much so.

Q. Do you think you compete with an athletic event if they charge admissions to that?

A. Well, if we were operating in Fayetteville, Arkansas, I guess, and we were permitted to carry the Razorback football game, we may be competing in one sense. I'm sure the University would like to sell out all of their seats before

they authorize anyone to carry their programming over t.v. I mean, [747] that's part of their funding as far as the University. So looking at it in that sense, I guess we would be considered.

Q. Imagine anybody driving from Corning to Fayetteville for a Razorback game?

A. I doubt it. Oh, I'm sure they are some.

Q. How do you decide what channels you put on your system?

A. It's basically based on how we feel, or what we feel our subscribers want. I mean, we get certain feedback—"I'd like to have Nickelodeon." I mean, we just listen to that. Basically choose and pick what we want to carry based on input from our subscribers.

Q. Do you review programs before you put them on to see if you think that is something that folks in your area ought to see?

A. Well, we want to know what we're putting on. Yes, we would review it.

Q. Do you provide—does your company do any programming where you sit down with your cameras and crew and decide you're going to put this on, and you go out and get the folks together, and make up a program and put on?

A. Well, we're—we do some local programming. Not us as cable operators. We—we're carrying some church services and things like that. They are live productions where we have leased out so many hours on Sunday, or—you know, some time, you know, that we charge a fee that they can air their church programming. It's based on more or less just a maintenance fee to recoup our cost in building the lines

for them and giving them access. As far as us doing any filming ourself and producing [748] it, we're not in the process of doing that. We've got some city council meetings and some things like that that are being aired over some of the cable systems, which—you know, we provided the equipment for them to do that. It's just something, more or less, we give to the community.

Q. Do you know of any specific instances where you've had any customers to drop cable t.v. service because of the sales tax being levied on it?

A. There was a few that claimed that they couldn't afford an additional cost. It wasn't explained that they objected necessarily to the sales tax, but they reached a point where they—that's all they could afford. They were on fixed income. We have one incident now that we haven't settled with a condo association where the builder on a bulk account and one group of people authorized to make payments for all, and they have declined to pay the sales tax. We haven't done anything about it as of yet, but we have letters from them where they say that—

GAIL PRICE, a witness called in behalf of the Plaintiffs [749] was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Price, would you state your name and address please, sir?

A. My name is Gail Price. I live at Route 3, Box 421 in Conway.

Q. Would you tell the Court what your professional employment is please, sir?

A. I am Manager of State Sales and Use Tax Office.

Q. For the Revenue Department of the Arkansas Department of Finance and Administration?

A. Yes.

Q. Is it under your supervision that the sales tax in question imposed by Act 188 of 1987 as collected?

A. That's correct.

Q. Are there both state and local sales taxes imposed in the State of Arkansas?

A. Yes.

* * *

[753] Q. On the satellite—you've been in the Courtroom today and heard the testimony by the other witnesses.

A. Yes.

Q. The satellite transmission of either radio signals, such as the [754] Arkansas Radio Network or the HBO, to a dish owner, there's testimony that there is a charge for that service. Is that subject to sales tax in the State of Arkansas? That service charge?

A. Say that again. I think—

Q. (Interposing) The HBO signal, I believe Plaintiff's Exhibit Number Two, was a listing of the scrambled services.

A. Right. Correct.

Q. And you can pay a monthly charge and have it unscrambled so you can receive it. I think Senator Bumpers has complained about the amount of the charge. But does that State of Arkansas impose a sales tax upon the providing of that service, that video service, to the individual owner or the amount he pays in gross proceeds. Is there a sales tax imposed upon that?

A. No, there is not.

Q. There is upon the delivery of that HBO program by a cable system, because of the provisions of Act 188 of 1987. Is that correct?

A. Correct, yes.

Q. Prior to the adoption of that Act, there was no sales tax imposed upon the providing of that service by cable television?

A. That's correct.

Q. There's no tax upon the sale of newspapers in Arkansas?

A. Basically, no.

Q. There is no tax upon the sale of magazines published in the State of Arkansas that are sold by subscription?

A. That's correct.

[755] Q. There is a tax, a use tax, imposed upon the sale of magazines by subscription if they are published out of state?

A. Are you talking about over the counter?

Q. No, out of state published magazines sold by subscription into Arkansas?

A. Yes. Yes, there is, yes.

Q. And there is a use tax on that?

A. There is a use tax, yes.

Q. And over the counter sales of magazines, whether they are published in Arkansas or not, are subjected to the tax—this gross receipts tax?

A. That's correct.

Q. Now, we've had some discussion about a System Master Antenna Television System called the SMAT-V, which is all on one property, such as a hotel, or apartment house, or a trailer park, and if there is a charge made by the owner of that system to the users, is that subject to sales tax in the State of Arkansas?

A. I would think so, yes.

* * *

[756] MR. SAYRE: Though Mr. Price answered the Interrogatories, I'm sure that Mr. Zakrzewski assisted him on the Request For Admissions, and I would ask Mr. Zakrzewski that we could simply stipulate to introduce as Plaintiffs' Exhibit Seven the responses to Request [757] Number 85, 87, and 88 with regard to House Bill 1031 in the Special Session.

MR. ZAKRZEWSKI: No objection.

* * *

CROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. Mr. Price, on the HBO question that you answered, if that signal is provided through the use of a scrambler or decoder, which as I understand is a piece of tangible personal property, and there is a rental charge for that, would that charge be subject to sales tax?

A. The equipment, itself?

Q. The charge for the rental and the rental of that equipment?

A. Yes. Yes, it would.

Q. What about any other charges connected with the rental of that? Would that be subject to tax as part of the gross receipt?

A. Yes.

Q. Are the rentals of movie video tapes subject to sales tax?

A. Yes.

[758] Q. How about the rental of VCR's? A. Yes, they are.

Q. How about the sale of VCR's? A. Yes.

Q. How about the sale of television sets? A. Taxable.

Q. How about radios? A. Yes, they are taxable.

Q. How about a ticket of admission to a movie theatre? A. Taxable.

Q. How about a ticket of admission to a theatre for a live performance? A. Taxable.

Q. How about a sale of a record or audio tape? A. Taxable.

Q. How about admission to an athletic event? A. Taxable.

Q. Okay, Mr. Price if the Court—

THE COURT: (Interposing) What about these motels that say free television services? Is that taxable?

A.If there is no charge being made, there would be no tax due.

THE COURT: Well, where it's presumed though as part of the cost of the room. I mean, you'd really getting into a technical area.

A. We are taxing the room. So, we're getting it.

THE COURT: You are already taxing the room. So you are getting it. [759] A. Yes.

THE COURT: Proceed.

REDIRECT EXAMINATION
[766]

BY MR. SAYRE:

Q. Mr. Price, you stated that if a decoder was rented or leased, that it would be subject to sales tax, and if the service provided over the leased decoder, it would be subject to sales tax, I believe. Was that your testimony?

A. I believe that's correct, yes.

Q. All right, if the decoder is sold—somebody pays Three Hundred Dollars for a decoder, and it's sold. There's a one time sales tax on that, is that correct?

A. That's correct, yes.

Q. Thereafter, there is no sales tax imposed upon the providing of that HBO or ESPN service through that decoder from a satellite, is there? A. That's correct, yes.

[777] *MAYLON MARTIN*, a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Would you state your name and address please for the record, sir?

A. Maylon Martin, 5804 Timberview Road, Little Rock, Arkansas.

Q. What is your profession or employment, sir?

A. Director of the Department of Finance and Administration, State of Arkansas.

Q. And you are a member of the Governor's cabinet? A. I am.

Q. During the legislative session, were you one of his chief lobbyists with regard to tax and revenue matters?

A. I'm not sure I designate myself as being a lobbyist. I am the person who for some reason has been designated to testify in revenue and taxation committees, yes.

Q. With regard to your testimony on the bill that became Act 188 of 1987, did you testify with regard to that Act?

A. I'm certain I did, yes, sir.

Q. The purpose for that Act is to raise general revenues, is that correct?

A. That's true.

Q. Is there any other compelling interest to be served by the adoption of Act 188 and the imposition of the tax on cable television service, other than the raising of general revenues?

A. Well, I can say there was original intent of spreading the base of taxation to provide additional revenues not only for now, but to spread the sales tax base so that there would not be a continued erosion of the tax base or general revenues for state government.

Q. But is was for general revenues? A. Right.

[779] Q. Not for any other purpose or interest that the state imposed a tax on cable television?

A. For general revenues. My point being that there was a consciour public policy decision made to expand the base of what we were taxing with sales taxes to not only provide additional revenue now, but to discontinue the erosion of the sales tax base in Arkansas.

Q. All right, but with regard to a tax being—this tax, this specific tax being imposed upon cable television service, is there any compelling interest of the state that would serve other than production or the generation of general revenues?

A. Well, the production of general revenues serves the purpose of keeping state government whole and of providing for services deemed to be appropriate and necessary by the General Assembly of the government.

Q. In the general running of the government? A. Right.

* * *

CROSS EXAMINATION

BY MR. ZAKRZEWSKI:

Q. Mr. Martin, did you project how much this tax would generate?

A. We have projected approximately Two-point-Six Million. The association, I think, during hearings, projected more than that. Closer to Three-point-Four Million, if I remember.

Q. And is that on an annual basis? A. That is on an annual basis.

Q. And, what percentage of general revenues would this tax represent?

A. Very small. Between one-tenth, and right under two-tenths of one percent of our general revenue.

THE COURT: The state? A. Yes, sir.

* * *

IN THE CHANCERY COURT OF PULASKI COUNTY
FIRST DIVISION
[956]

DANIEL L. MEDLOCK, et. al. PLAINTIFFS

vs. No. 87-2401

JAMES C. PLEDGER, Commissioner of Revenues; et. al. DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS INTERVENOR

Testimony and other proceedings taken ore tenus at the Bar of the Court on the 9th day of May, 1988, before the HONORABLE LEE A. MUNSON, Chancellor, presiding.

APPEARANCES

FOF THE PLAINTIFFS,
Honorable Eugene Sayre

FOR THE DEFENDANTS
Honorable Joe Morphew
Honorable Robert Jackson
Honorable David H. White
Honorable Kaye JJ. Demailly
Honorable Robert Parker

[957] TESTIMONY IN BEHALF OF THE PLAINTIFFS:

BOB BLOUNT, a witness called in behalf of the Plaintiffs was examined and testified as [958] follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Blount, would you state your name please for the record?

A. My name is Bob Blount.

Q. What is your professional employment please?

A. I am Executive Secretary of the Arkansas Cable Television Association.

Q. Are you the same Bob Blount that testified earlier in this proceeding on August 19, 1987, concerning the operation of cable television in the State of Arkansas?

A. Yes, I am.

Q. Mr. Blount, I hand you what's been marked as Plaintiffs' Exhibits Number Eight and Number Nine and ask if you would identify those for the purpose of the record, sir?

MR. SAYRE: Your Honor, we also wouuld request that any testimony or exhibits offered at the preliminary hearing also be considered as part of the record in this proceeding.

THE COURT: They will be.

BY MR. SAYRE:

A. Exhibit Number Eight is a photocopy of—from the Arkansas Democrat issue of Saturday, April the 30th, 1988, which gives the television programming for that day available in Little Rock and North Little Rock.

Q. On the basis of local broadcast channels, cable channels and the—what's considered premium channels, the HBO, Movie Channel, Showtime, [959] Cinimax and the Disney Channel in this community?

A. Yes, this is the programming for what's broadcast and cable television.

* * *

[962] BY MR. SAYRE:

Q. Mr. Blount, I'd ask you to identify what's been marked as Defendants' Exhibit Nine, the magazine.

A. Exhibit Nine is a photocopy of page B-5 from the April, 1988, issue of Orbit Magazine. It's a national publication. This is a listing of the locations, identifications, and programming available on satellites in orbit for television program viewing by earth stations.

* * *

[963] Q. Mr. Blount, would you describe for the record please what the Orbit—Satellite Orbit publication is, and who it's publishers are?

A. Satellite Orbit is a news and information magazine published monthly for utilization by—primarily by the cable television operators and by over a million and half satellite dish owners, back yard owners. This is their program guide like you would get out of a newspaper, a daily newspaper. It tells them the location, where to point their dish for their programming, for people who are not on cable television.

Q. Is the—the double page spread of the guide, which is listed as Plaintiffs' Exhibit Nine, carried on a monthly basis?

A. Yes, it is.

MR. SAYRE: Your Honor, we would again offer Plaintiffs' Exhibit Nine for the limited purpose of showing the programming that is offered from satellite broadcast, on both a scrambled, meaning decoder, and an unscrambled basis. For that limited [964] purpose only.

THE COURT: You may introduce it for that limited purpose, not as to its accuracy or its truth and matter asserted in any way, but that there is a nagazine published monthly that goes out to a million and a half subscribers of cable dishes who uses that as a guide for determining what program they wish to watch. Now, that is perfectly acceptable. It doesn't violate the hearsay rule.

MR. SAYRE: Going back to Exhibit Eight then, Your Honor, we would—

THE COURT: (Interposing) And for that matter, the Democrat ad could go in.

MR. SAYRE: We would offer for the purpose—

THE COURT: (Interposing) Of showing that they do advertise—

MR. SAYRE: (Continuing)—the regular—excuse me, the regular programming that is—

THE COURT: (Interposing) Not for those programs, the ones that are going to be shown necessarily, but in fact they do offer them to be shown, or might be shown.

MR. SAYRE: And I think the Democrat has substantial circulation within this particular community.

* * *

THE COURT: For those limited purposes, they will go in over [965] their objection.

* * *

BY MR. SAYRE:

Q. Mr. Blount, as the Executive Director of the Arkansas Cable Television Association, are you familiar with the type of programming that is available for use on the cable system operator's systems or the channel programming that is available?

A. Yes, I just completed a survey of all the cable systems in Arkansas where I asked them to give me the programming that they provide and the channel assignments, and this will be published next week in our association directory.

Q. That same information has been made available to the State in answer to their interrogatories?

A. Yes.

Q. Would you describe for the record please what types of news programming are available for cable television system operators in the state of Arkansas to broadcast?

A. Specific programs, which are only satellite delivered, not available broadcasts, C-SPAN, which is an all news network coverage [966] gavel-to-gavel of the House of Representatives. This is owned and operated by a consortium of cable systems which provide this all news coverage.

Q. Are there more than one C-SPAN channels?

A. Two—there are two C-SPANs. At the present time in Arkansas, only C-SPAN-One is carried. C-SPAN-Two is gavel-to-gavel coverage of the U. S. Senate.

THE COURT: What does it mean? What does C-SPAN mean?

MR. WHITE: Cable Satellite Public Affairs Network.

THE COURT: That is just for the record.

MR. SAYRE: I realize the Court's admonition not to speak in acronyms, trying to satisfy that.

BY MR. SAYRE:

Q. Besides the gavel-to-gavel coverage of the Federal Congress, what other types of news programs are offered on the two C-SPAN channels?

A. Cable—on the two C-SPAN channels, there's also coverage of important news conferences, appearances at the National Press Club. There's also a call-in show, a nationwide call-in show where they have prominent individuals in government or economics. Our own Congressman Robinson had appeared a couple of times on it. People have called in nationwide with a question to get answers, live show.

Q. During the hearing on the preliminary injunction in this case, I believe the Southern Legislative Conference was meeting here in Little Rock at that time, and C-SPAN covered that also, did they not?

A. Yes, they did. It was live with the support of Storer Cable here [967] in Little Rock providing a lot of the back-up for it. But it was live coverage.

Q. So that—is that original programming that is produced for cable television only?

A. Solely for cable television.

Q. What other types of news programming are available?

A. There is Cable News Network, which originates with Turner Broadcasting in Atlanta, which is one hundred percent news.

Q. How long—excuse me—how many hours a day is the C-SPAN broadcast?

A. I think C-SPAN is on on eighteen hours a day, if I'm not mistaken.

Q. What about the CNN?

A. CNN is twenty-four hours a day.

Q. Are there other?

A. Yes, there is CNN's Headline News Network, which is a thirty minute summary of news worldwide, which repeats itself once an hour.

Q. Are there other specialized, let us say, news or weather services available for cable services?

A. Yes, there's the weather channel, which is strictly a cable service, satellite delivered, and it's twenty-four hours a day weather information. There is also a financial news network, which is Financial News, which has eighteen hours a day programming.

Q. Are there any specialized types of programming available with regard to medicine, the law professions, this type of thing?

A. Lifetime channel is strictly for health information, the whole person concept. That's a good example of specialized programming for information.

Q. Are there foreign language broadcasts available for cable dissemination?

A. SIN, which is Spanish language network. They just recently changed their name, but don't ask me what that is in Spanish. But that's—it originates from Mexico City, and it's all Hispanic, and it's carried, as an example, here in Little Rock on the University Access Channel.

Q. Is the news that is presented on these types of cable programming similar to news that is presented either in a magazine or a newspaper in the print media?

MR. MORPHEW: Your Honor, I object to that. This witness is not competent to testify as to the similarities between news presented on a cable t.v. program and what's presented in a magazine or newspaper. He has no knowledge whatsoever.

THE COURT: He could have personal knowledge of it, just as I could. Overruled.

BY MR. SAYRE:

Q. Do you read newspapers and magazines of a news nature?

A. Two newspapers and three magazines regularly.

Q. Do you—would you answer then or respond to the question with regard to the type of coverage offered by these news programs on cable television versus the news programs—excuse me, the news media and the print media?

[969] A. Two of the best analogies that I coiuld draw would be first of all with regard to this CNN—the full—where they have one hour news programs and this sort of thing. I would say this is very much like any of the major news magazines where they have time to go in depth on a given story. Generally speaking, a programming like Lifetime that I referred to would be like Readers Digest. A little bit of—you know, a great deal of variety to appeal to a broad range of people who are just not specifically news oriented. Probably the best analogy that just occurred to me is the analogy between Headline News Network and the newspaper. USA Today. Just get to the point, very concise, very pointed presentation of news.

Q. In some instances it would be the same, and in others it gives a chance to go into more depth?

A. Sure.

Q. I hand you what's been marked as Plaintiffs' Exhibit Ten and ask if you can identify that?

A. Exhibit Ten is the January, 1988 copy of Readers Digest magazine.

Q. Are you familiar with the Readers Digest magazine?

A. Yes, I am.

Q. Could you explain to the Court your understanding of what types of articles are published in the Readers Digest?

A. Big variety. The best example you could do is just read the titles of the articles. "Mamma Pulled The Load Alone", which obviously is a human interest article from Southern Magazine. "How To Teach Children To Behave", "Who's Making The Big Bucks", "Who Says Experts Are Always [970] Right". Great variety.

Q. Generally, are those original publications in that magazine, or are they republications of other stories that first appeared in other media, either newspapers or magazines?

A. I would hesitate to try to put a percentage on it, but a large number of these have appeared—as an example, "Help For Your Aching Back" appeared in Esquire Magazine in September, 1987. Obviously, it was purchased by Readers Digest to run in this issue.

Q. Is there advertising contained in that magazine? A. Yes, there is.

Q. Is there advertising run on cable television? A. Yes, there is.

MR. SAYRE: Your Honor, we would offer as Plaintiffs' Exhibit Ten as one example of a print media that is similar to the programming offered on cable television services the January, 1988 issue of the Readers Digest, simply for exemplary purposes.

MR. MORPHEW: Your Honor, I am going to object to its introduction for that purpose. I don't think any foundation—I have recalled two questions. Number one, is there advertising in this?, and number two, is there something in there that was reprinted elsewhere? I don't think that sufficiently establishes any similarity between this publication and cable television.

THE COURT: I guess that is up to me to determine, isn't it? That's what we are here about. It will go in over your objection.

* * *

[971] BY MR. SAYRE:

Q. Mr. Blount, in your tenure as Executive Director of the Arkansas Cable Television Association, have you become familiar with the television broadcast industry in Arkansas also? A. Yes.

Q. Is there a relationship or a competition, or at least a relationship between cable t.v. and broadcast t.v.?

A. A very close symbiotic relationship between the two.

Q. Would you explain to the Court what you mean by symbiotic?

A. Well, they help one another. As an example, all of the broadcast television stations in Little Rock, Channel 4, 7, 11 and 16, have had contact with me on many occasions in an effort to ascertain which cable systems carry their programming in which parts of the state. It is very important to them because obviously someone who lives in Rogers, Arkansas, is not going to be able to pick up with rabbit ears Channel 11 out of Little Rock, and the only way it appears there is because a cable operator has gone to the expense and effort to do the additional antenna work, and in many cases build a microwave system to bring that television channel into that part of the state. So in that sense, it helps the broadcast stations in the sense that it gives the cable operator another desired program to run on his cable system that assists him. So that's the relationship.

[972] THE COURT: Do those cable operators pay a fee to the local stations?

A. No, sir, they don't pay fees for a broadcast off the air programming.

Q. These are sometimes within the area, and I think Mr. Tucker testified about this, the must carry application of the cable communications policy owners.

A. Well, it's an FCC regulation.

Q. An FCC regulation? Is Channel 16 in Little Rock considered a satellite broadcast station or a super station that's broadcast off satellites?

A. They would like to be, but they are not at this time.

Q. Are they carried beyond the broadcast range in the central Arkansas area by other cable companies in Arkansas?

A. Yes, they are.

Q. I hand you what's been marked as Plaintiffs' Exhibit Eleven and ask if you can identify that please, sir?

A. This is a list of Arkansas communities served by cable television, which I compiled for the Arkansas Cable Television Association, based on data the cable system provided me. This lists the—it's an alphabetical listing of the community, every community in Arkansas that we could identify that has cable television, the ownership of that system, and all of the programming they provide with channel assignment for each of the programs.

Q. Did you conduct this survey personally?

[973] A. Yes, sir.

Q. Did you compile these results? A. Yes, sir.

Q. And also the computer printout, which is Plaintiffs' Exhibit Eleven? A. Yes, sir.

• • •

CROSS EXAMINATION

[974]

BY MR. MORPHEW:

Q. Mr. Blount, you mentioned several programs which were characterized by Mr. Sayre as news programs. One of those was the Lifetime channel. I think your comment was that it dealt strictly with health and related matters?

A. That's their principal focus.

Q. It's not their only focus though, is it? Isn't it true that that station in particular shows a lot of movies, particularly old movies?

A. It shows one movie a day, I believe, sometimes two, and they deal with women and women's problems.

Q. You don't know that that's all they show, do you?

A. I'd have to go get their program log for a year.

Q. But they are not strictly any kind of informative or news type of station?

A. That's primarily their sales pitch.

Q. The SIN Network, the foreign language broadcast, that is not a—strictly a news program either, is it?

A. No. I don't think we characterized it as news. I think we characterized it as strictly foreign language information.

Q. Which carries—

A. (Interposing) It has Spanish news on it.

THE COURT: It has everything on it. I've seen it.

A. Boxing, movies.

[975] THE COURT: Bull fights.

Q. Mr. Blount, you are not—you would not take the position that cable television is somehow in direct competition with the Readers Digest or some other publication?

A. No, it's analogous to it.

Q. But again, you wouldn't take the position that they—that cable television competes with Readers Digest dollars for entertainment purposes? A. No.

* * *

BY MS. DEMAILLY:

Q. Mr. Blount, t.v. and all this cable network and so forth I find very confusing, and I'm sure I'm not the only one. Are you saying that you provide the same type of service that the local t.v. stations do as far as providing news and so forth?

[976] A. Vastly expanded.

Q. Vastly expanded?

A. Yes, because of the much, much greater variety and the opportunity provided to be much more specialized.

Q. But—and since you're saying that you're analogous though, a much—in your terms—much more expanded to the

local t.v. stations, you pay sales tax, or your customers pay sales tax for the receipt of this information in their homes, is that correct?

A. They pay sales tax because it's delivered by cable to their home.

Q. So it's the delivery system? Is that—is that the difference?

A. That's what's being taxed.

Q. So if it's the delivery system, we have no way of determining who turns their t.v. set on and who does not on a non-cable basis, is that correct?

A. That's correct.

Q. But we do know who contracts to purchase the ability to gain, whether it's entertainment or any other piece of programming offered by your organization, is that correct?

A. Just as I suppose you would be able to do if you could get a subscriber list of everybody in Arkansas who subscribes to Readers Digest, or to Life Magazine, or Time, or Newsweek.

Q. So it's the matter of the delivery system?

A. That's right.

Q. And whether or not the sales tax is capable of being identified to a specific purchaser?

[977] A. What you're—actually what this does, it taxes the specific service. It's a service tax to tax gross receipts tax on the service.

Q. On the service? But without renting your equipment, your box, they can't get it, is that correct?

A. That's correct.

Q. So once again, you have the ability to determine—and it's—

A. (Interposing) Let me correct that just a little bit.

Q. Okay.

A. You said without renting our service or our box, they can't get it. Yes, they can. They can go out and buy a satellite dish and contract with someone else to get that same service and not pay sales tax on it.

Q. But they pay sales tax on the purchase of the satellite dish, is that correct?

A. Perhaps.

Q. Perhaps. And do you know whether or not for sure they pay sales tax on whatever additional mechanical apparatus or service that they gain to de-scramble?

A. I assume. I have not purchased one. But I assume if one purchases a decoder, you'll pay sales tax on it. I'm not sure what the arrangements are when one leases the equipment.

Q. But we do have, in this particular case with your t.v. cable association, your member associates have the ability to determine what services, what programs a person is buying. There's basic cable there's premium channels, and the pricing for each of those is [978] different. You buy—oh give me basic cable and give me Movie Channel and Cinemax. All right, your bill is X-number of dollars a month. If you want to add another premium, it's an additional amount.

A. That's generally the way it works.

Q. And that's directly correlated—or correlates to the sales tax for the service of seeing those channels?

A. The gross receipts tax is applied to the delivery of those channels, yes.

* * *

BY MR. MORPHEW:

Q. Mr. Blount, these other programs that you mentioned of a news or information type, C-SPAN, Headline News, CNN News and the Lifetime, many of the programs carried on those are rebroadcasts of an earlier taped program, is that correct?

A. Some of them are. I'd be hesitant to say many because so much of C-SPAN is live. Almost all of CNN is live in the sense that you have a live news commentator sitting there.

THE COURT: C-SPAN is only live part of the day, though, are they not, and then they will rerun the Senate and the House late at night?

Q. Programs run on some of these other channels like Lifetime have been—

[979] A. (Interposing) Most of that is prerecorded and run at a given time, yes.

Q. Rebroadcast?

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Blount, when you purchase a t.v. set, you pay sales tax on it.

A. That's correct.

Q. On the carrying of the broadcast station, the local broadcast station, both here in Little Rock, Fayetteville, Jonesboro. I believe those are the only broadcast stations in Arkansas. Perhaps there's one in El Dorado.

THE COURT: El Dorado has one.

Q. El Dorado has one. Do the local cable companies in those areas also carry the broadcast stations on their cable systems? A. Yes.

Q. So there's local news presented in the same way that national news is presented? A. Yes.

Q. In effect, there's a duplication of the same programming on cable that there is in broadcast. It simply depends on the method of delivery?

A. That's correct.

Q. As part of the delivery through cable—that's part of the [979-A] programming costs that are taxed. The local broadcast stations are recarried on cable television as part of the programming, and the entire programming package is taxed. A. Yes, yes, sir.

* * *

PAUL GARDNER, a witness called in behalf of the Plaintiffs was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Paul, would you state your name and address for the record please, sir?

A. My name is Paul Gardner. I live on Highway 81 North, Monticello, Arkansas.

Q. You're the same Paul Gardner that testified in this proceeding on August 19th? A. Yes, I am.

Q. At that time, you were President of the Arkansas Cable Television Association, is that correct? A. Yes.

Q. Have you had cause to lose that position?

A. I was re-elected in New Orleans last month.

[979-B] Q. So you're still serving in that capacity? A. Yes, sir.

Q. Would you state for the record please how many cable systems does Community Communications Company own?

A. We operate six cable systems.

Q. Would you state the communities that you operate in please?

A. Monticello, Warren, Eudora, Arkansas City, Tiller and Reed, which is one system, and East Camden.

Q. What is your largest system, and what is your smallest system?

A. Monticello is the largest system, and the system at Tiller-Reed is the smallest.

Q. Approximately how many people are served in each of those communities?

A. We have a little over three thousand subscribers in Monticello. which would translate to roughly nine hundred customers people. And in Tiller, we have about one hundred twenty homes, which on the average would be around three hundred fifty people.

Q. Paul, how do you receive the programming signals that you transmit by cable to your customers or subscribers?

A. We receive it off of satellite and off air.

Q. I hand you what's been marked as Plaintiffs' Exhibit Nine reflecting the satellites—the number of satellites and the broadcasts that are available. Is that generally descriptive of the type of programming that is available to you as a cable system operator? A. Yes, it is.

[979-C] Q. Would you describe for the Court the systems or the types of programming that you carry on your six systems, and by that, I mean, are they identical, are they different, and if they're different, why are they different?

A. Well, in Monticello, we carry a total of thirty channels, being our largest system. The people are a little bit more varied there. We have several factories. We have a branch to the University of Arkansas. We have some agriculture there. So, therefore, we look at different types of programming. News programming, cultural-type programming, programming on the Lifetime network, which has medical programming, is real interesting. In Eudora, for instance, we run about twenty-two channels. We don't have near the variety of programming there, because of—we have more agriculture in the area. So, we try to pick the programming that would be more interesting to the people. Eudora is largely black population. Therefore, we have on

down there black entertainment television, which is oriented to the black American.

Q. As the owner of these systems, who makes the final determination of what programming goes on each system?

A. I make the programming choices for our systems.

Q. Each system does not carry identically the same programming?

A. No, sir, they do not.

Q. Do you, from time to time, change the programming on these systems?

A. Yes, sir, we do make changes from time to time.

Q. Would you explain what factors go into your consideration of changing these programs?

A. Well, it can be change in the particular channel's programming. Costs. They can raise their rates where it might be prohibitive for us to carry it in a particular tier, or even carry it at all any more. But the programming is one of the big factors that we go by.

Q. Have you changed programming or, as you said, the tier of programming in your systems that has met with controversy or an attempt by the franchising city to change that decision by yourself?

A. Well, any change you make, you meet with some controversy regardless of what the programming is. Probably the biggest controversy we had was about three or four years ago when we moved ESPN out of our basic tier of services into a higher priced tier, and we did receive quite a bit of problems with the city fathers and the mayor.

Q. In what city?

A. In Monticello.

Q. Was pressure brought upon you to make a change, put it back into the basic?

A. Yes, sir, we were offered rate increases. We were also threatened with some other—losing a franchise and so forth. But, we did have the authority to do what we did, and we stuck with it.

Q. You were present in the courtroom on August 19, 1987, when Mr. Tucker testified about his system, County Cable, here in Pulaski County, offering both cable service and satellite delivery through decoders. You've heard that testimony?

A. Yes.

Q. Do you offer in your six systems a similar dual system of delivery?

[797-D] A. Yes, sir. We have—in three of our systems, we have what we call an addressable system. We use converters in all six of our systems.

Q. Would you describe for the Court what types—what differences, if any, would be the programming under your satellite delivery, which is your cable delivery? Of the programming? In other words, the types of programs that are delivered on your cable system versus the types of programs that are delivered from the satellite on the decoder. Is there any substantial difference in that programming?

A. No, sir.

Q. The scrambled items—scrambled channels do not simply cover what have become known as the premium channels, do they?

A. No, sir, most all cable channels are scrambled today.

Q. This would include the super-station, such as WOR, WGN?

A. All super-stations are scrambled today. From time to time, they will descramble them with technical problems and so forth, but all super-stations are scrambled.

* * *

Q. What about the Cable News Network, Headline News, Weather Channel, these types of programs?

A. The Weather Channel is not scrambled at this time. Cable News Network, C-SPAN is not scrambled at this time. Cable News Network—both Cable News and Headline News are scrambled.

[979-F] Q. When you deliver—do you use Cable News Network as part of your basic program?

A. It's basic in all of my systems, yes.

Q. Are there subscribers in your systems who receive these types of programmings through a decoder directly from satellite broadcasts?

A. Yes, in Monticello, Tiller, and in Eudora, we do some direct C-Band to home satellite dish owners. Eudora is the system that we have the biggest majority. Probably fifteen or twenty customers in Eudora have satellite dishes and buy through us.

Q. Do you—when you say buy through you, would you describe for the Court how you collect for the charges—collect for the services delivered by satellite versus on your cable in Eudora?

A. Okay, we have—the biggest—what most people want is the premium channels, HBO, Showtime and so forth. We do have some subscribers to ESPN, Cable News Network and some of those items. We charge the same rate in our systems if they are getting HBO in Eudora on a cable system or if theya re getting HBO on a satellite, they pay our same Eight Dollar fee.

Q. Would it be the same with regard to ESPN or—

A. (Interposing) We have a basic package for—what we call our basic satellite services.

Q. Those monies are paid to your company as opposed to being paid directly to some satellite company in another state?

A. Right, they have—the homeowner has the option of buying from us or from one of the services, HBO or whatever. When we collect it, then [979-G] we withhold our part, and—or we actually just pay them a rate that they have set for us.

Q. So, you—excuse me. Do you sell decoders?

A. Yes, I do sell decoders.

Q. When you sell decoders, do you charge the state sales tax on the decoder?

A. Yes, I do.

Q. And the local sales tax, if applicable?

A. Right, I do.

Q. Thereafter, on the monthly service charge for the satellite delivery, do you charge the sales tax?

A. We do not charge the sales tax on the program delivery.

Q. On your cable delivery, do you—in the same communities, do you charge sales tax?

A. Yes, we charge. They could be getting HBO in Eudora off a satellite, and they would actually be paying a lessor rate than they would off the cable system because of the tax.

Q. Do you have access channels in each of your communities?

A. We have channels that are set. They're not designated, but they are set aside in the franchise that they are available.

Q. Are there instances that you can tell the Court where your access channels have been utilized for original programming or coverage of local news events?

A. Yes, in a system in Warren, we have a channel that is used. They do taped delayed broadcasts of the city council meetings, football [979-H] games, the Pink Tomato Festival, and in Monticello, up until about a month ago, we were running the Arkansas Works program that was made here in Little Rock and sent out to various cable systems throughout the state.

CROSS EXAMINATION

BY MR. MORPHEW:

Q. Mr. Gardner, you indicated, I think, that you operate six cable systems all in Southeast Arkansas, and that of those six systems, only Monticello has the varied program that you spoke—the varied programs that you spoke of?

A. No, sir, we have—we carry thirty channels in Monticello and Warren. In Eudora we carry twenty-four channels. Our average at all of our systems is probably around twenty channels.

Q. Monticello and Warren, did you say, would have those additional news and information-type programs that you referred to?

A. We have the same programming in Monticello and Warren.

Q. But in the other areas that you serve, you don't carry those stations, I believe, because you said people have different interests?

A. Correct.

Q. Different type of people with different interests, whether it be because they are agricultural or because they're black or whatever?

A. Right.

Q. So in both of those, either in the Monticello-Warren areas or in [979-I] the other areas that you serve, what you carry for them is based upon what they want to see?

A. Their preferences play a big part in our programming, yes.

Q. You also indicated that because of the additional educational influence and other factors in the Monticello area, that was part of the reason that you felt those customers would want those additional services. Is that correct?

A. They express interest from time to time for a particular channel.

Q. You also indicated that it was that same Monticello area that caused the stir or the uproar when you decided to charge more or place ESPN in a different tier. Is that correct?

A. That's correct.

Q. ESPN is not a news or information-type program, is it?

A. It's—

Q. (Interposing) Sports?

A. A sports program.

THE COURT: Not necessarily, because they run a financial show every morning at Five O'Clock for about three hours.

MR. MORPHEW: I had forgot about that, Your Honor. I don't watch that part of it myself. So, I guess I'm not in that educated category.

A. They also have sports news on there.

Q. Excuse me?

A. They also have sports news on.

Q. This address-type system that you say you have, where you can act as a go between for a—I think you refer to it as a C-Band or—

A. (Interposing) Okay, the addressable system I referred to is not the same as the system for C-Band, no. The addressable system is in our cable system whereby we can—if you're renting one of my systems, and you wanted to subscribe to HBO rather than Showtime, we could turn one of them off and the other one on. That's the addressable system. The C-Band system is the home—well, actually C-Band is for any satellite reception, but the home dish owner, we do act as a go-between for those people when they want certain programming. They can come to our—call our office and get this program, or they can go direct to the programmer.

Q. The addressable system doesn't involve satellite dish at all?

A. No, sir.

Q. When you act as this go-between for a satellite or a C-Band company—I'm not sure how I should designate them—what—let me phrase this differently. How do you provide that service to your customer? The satellite—or not your customer, but the satellite dish owner who wants a particular service, how do you provide that service to them?

A. We contact the programmer, and they send a signal to the—through the satellite to the homeowner's decoder, descrambler.

Q. So, y'all don't hook up any wire or cable for that?

A. We have—we do sell home dishes and—or we used to sell, before they became so unpopular, home dishes and decoders, but at this time, we're mostly acting as providing a programmer for the homeowner. All we do is make a few phone calls.

[980] Q. When you provide this program, acting as the go-between, you don't string any wire or cable? A. No.

Q. To that person's residence? You're simply the collecting agent?

A. We start sending them a bill after we get it turned on.

Q. You—for your cable customers, do you have a network of satellites that you receive signals on?

A. Yes, I do.

Q. You don't pay any tax on the services that you receive from any of the satellite companies?

A. On the programming that we receive?

Q. No, no, I understand that you pay for the programming. Do you pay the tax?

A. Tax on the programming is what you're asking? No, sir.

Q. As I recall your testimony, whenever you would change programming, either delete a program or add a program, you indicated, and I think you indicated earlier in answer to my question as well, that the fact that that would determine or influence those changes would be your costs, whatever it costs you to get the program, and the desires and wishes of your viewers. Is that correct?

A. That's a couple of big factors. They could change satellites. We may not have a satellite available that we could. So the cost would be too great to keep them on.

Q. The original programming—I don't think I could write fast enough to get—you said that you had original programming, I think, in two [981] areas?

A. Warren is the one where we do the most.

Q. Warren has the one you mentioned had the football games and the Pink Tomato Festival?

A. Would be football games, the Pink Tomato Festival. The thing that we do probably with the most regularity is Church programming and the city council meetings.

Q. I'll ask you a question I asked Mr. Blount. You don't—you don't consider your system or the cable systems that you have to be competing for dollars with something like a Readers Digest, do you?

A. In a broad sense, I guess we're all competing for the same dollar, but, no, I don't today feel like that we're competing with Readers Digest.

Q. I understand that, but certainly if everybody in your cable system area bought a Readers Digest, you don't think that has any impact on your sales?

A. I don't feel like it does, no.

Q. Or the type of programming that you would offer?

A. No.

* * *

REDIRECT EXAMINATION
[982]

BY MR. SAYRE:

Q. Do you attempt to balance the type of programming that's offered? By that, I mean entertainment, sports—

A. (Interposing) A wide variety, yes. That's the big objective that cable companies can have is the fact that we can be narrow-cast, and we can offer a whole lot of different programming, where your off-the-air channels are trying to offer the variety on one channel.

Q. That is a selling tool or something that makes your service—

A. (Interposing) Yes, when we set up a tier of services, we try to keep a little variety in that tier so we can sell as many people in that tier as possible.

Q. From time to time, the programming within that tier changes?

A. Yes, sir, we do change it from time to time.

Q. What are the changes based on?

A. Again, programming changes, monetary changes, and so forth can cause this too. We can all—we will also add channels particularly to our tiers from time to time and try to make them more—you know, where more people would get on them.

MR. SAYRE: I pass the witness, Your Honor.

THE COURT: What's your experience in terms of—and this is just my own edification. In a given market, what percentage of the people will take a cable system and subscribe to it in your area?

A. In my market, we run in Monticello probably eighty-five percent of the homes have cable.

[983] THE COURT: Availability, eighty-five?

A. We're available to everyone in Monticello, Arkansas. In Eudora, we probably run seventy percent. We don't have

any systems that we don't run at least sixty-five to seventy to eighty percent. Wherein—well, metropolitan areas, it would fall off greatly.

* * *

CROSS EXAMINATION

BY MS. DEMAILLY:

Q. When you sell one of these decoders, you said you collect the sales tax on it at the point of sale? A. Right.

Q. You have no way of controlling whether or not they come for HBO to you, or they go straight to HBO, is that correct?

A. I do not. I do not.

Q. So you have no way of keeping up with it unless you just happen to remember John Smith over here bought a decoder from me, and now I wonder where he's going to get his programming. On the other hand, if they subscribe to your cable system, then you know exactly, once again, who is getting what, is that right?

A: That's correct.

THE COURT: He knows who has leased his decoders, because they pay a monthly fee on them.

[984] MR. SAYRE: That's what—they purchase the decoders, but they lease the service, or they provide the service.

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. And with regard to that, don't you also provide maintenance on the decoder?

A. We do for about six months on the decoders.

RECROSS EXAMINATION

BY MS. DEMAILLY:

Q. Is that like a warranty, or do they pay for that maintenance?

A. It's more like—I'm living in that town and have lived for the last thirty-nine years, and I know he will come back to me if I don't—

Q. (Interposing) I'm from a small town too. I understand that.

MR. SAYRE: Thank you.

* * *

DEAN DEYO, a witness called in behalf of the Plaintiff was examined and testified as [985] follows:

DIRECT EXAMINATION

BY MR. SAYRE:

Q. Mr. Deyo, would you state your name and address for the record please, sir?

A. My name is Dean Deyo. D-e-y-o is the last name. My address is 5450 Winchester Road in Memphis, Tennessee.

Q. What is your profession or employment please, sir?

A. I am the president of Memphis CATV.

THE COURT: That's not a bus company!

A. I hope not.

Q. Dean, may I admonish you, but the Court does not speak in acronyms, and we need to explain for him and for the record what the CATV—

A. (Interposing) I'm not sure that it really stands for anything. In the old days of cable, I believe it stood from Community Antennae Television.

THE COURT: That's correct.

A. It's simply the name of the company

Q. Does your company operate in any extent in the state of Arkansas?

A. Yes, we operate a total of nine franchises, and four of those franchises are in West Memphis, Sunset, Marianna and the Crittendon County, Arkansas.

Q. Could you give the approximate sizes of those systems by subscribers?

A. They are all technically fed off of one control center and serve [986] about eight thousand homes in those four communities. Well, three communities and unincorporated Crittendon County.

Q. Dean would you describe for the record please the—your educational background?

A. I have a degree from Northern Illinois University in broadcast journalism and television communications. I also am a graduate of the cable management courses from Denver University.

Q. Would you state for the record your work experience in the cable industry?

A. I've been in the cable industry for seventeen years. Spent two years as a producer and managing editor for a nightly news program on a cable television system in DeCalk, Illinois. Was the program manager for the first urban cable operation authorized by the FCC in Rockford, Illinois. Was five years there. Went from programming manager to doing public relations, advertising, assistant manager. Was general manager of Wisconsin CATV. In 1979, came to Memphis, Tennessee, as general manager to build the systems in Memphis and the Memphis suburbs and became president of the corporation, Memphis CATV, in 1984.

Q. Approximately how many subscribers does Memphis CATV serve?

A. We serve one hundred and forty thousand customers in the Memphis-metro area, three states, in Tennessee, Arkansas and Mississippi.

Q. Do you personally or have you personally been involved in the programming or choice of programming carried on your cable system?

A. Yes, also in conjunction with my staff but I have personal input in the programming.

[987] Q. Are the programs that are carried in Memphis proper the same that are carried in West Memphis, Sunset, Crittendon County?

A. No, we have different programming on our three different operations. We basically divide our operations into Tennessee, Mississippi, and Arkansas and there are different program choices in those three areas.

Q. Would you describe for the Court what objectives you try to meet in the choosing or the choice of programming that you offer, say, on the Arkansas system?

A. Well there's a number of different objectives that we are looking for. Some of them go to personal tastes, although I've been in the business for seventeen years and try to keep my personal taste out of that. I know that's a very difficult thing to do. We do sophisticated research with our customers to determine what their tastes are. We subscribe to Arbitron Service for ratings in order to determine what is being watched in those markets. Costs and business factors play into what's happening. And because of our geography, we try to make sure that we have the type—we try to defer to the statewide program. In Arkansas, we make sure that we have Arkansas news and entertainment programming on. And, I guess, finally we try to make sure that we have a balance of programming so that we are not skewed toward any one particular type or style of programming.

Q. How many channels are carried in your four Arkansas systems?

A. I believe they carry thirty channels currently.

Q. Are there public access channels in each one of these?

[988] A. Yes, again, technically, the four franchises all have the same channels, because they're served technically from the same control center, but we do have local channels that we program for that operation in Arkansas, yes.

Q. Is there any original programming carried on by Memphis CATV?

A. Yes.

Q. Would you describe for the record please what type of original programming is done and the amount of it?

A. Well, to define original programming, very specifically, we have produced original drama, plays, teleplays that have been written specifically and produced in our studios. Comedy programs that are, again, may feature local talent or national talent, but were written and produced specifically within our studios. Live programming, which, of course, is all original as it's produced. Sports programming, public affairs, documentary programming, any number of things.

Q. Are these carried on your West Memphis system and your Crittendon County, Marianna, and Sunset systems, as well as the Memphis system?

A. Some of them are, yes. It just depends on the particular programs. There are other programs that are produced specifically in West Memphis that are only carried on that system and not carried on the Memphis or Mississippi properties.

Q. Is there advertising carried on your cable television channels in Arkansas?

A. Yes, we have limited advertising on the Arkansas system, very extensive advertising on the Memphis systems, and we have a full [989] program of extensive advertising that we'll introduce in Arkansas next year, in 1989.

Q. Is this both of a local and a national nature?

A. Yes, we sell—we have national representatives under contract to us that sell national advertising specifically

for our systems in markets such as New York, Chicago, Detroit, Atlanta, Los Angeles. And we also have a local advertising sales force that sells local commercial sponsorships.

Q. Would you describe for the record please how these are broadcast or cable cast to your users?

A. Many of the channels that we offer on our system provide X-number of minutes per hour of availabilities for local advertising use. If a cable system does not use that advertising, there will be another national commercial that will be there or public service announcement that will be there so it's not a blank in case someone—in case a system does not sell local advertising, but we are notified where those placements are, both in advance with a cue-sheet and through electronic tones, and we then insert our local commercials over the top of the feed that's there.

Q. Would you give us a specific example of a programming or network that offers that type of—and how many minutes per hour would generally come out of that?

A. We currently sell local sponsorships on eight nationally delivered channels in addition to our local channels that we produce ourself. ESPN would be a prime example of one that allows—I believe ESPN has [990] two minutes of advertising per hour that's available to the local use.

Q. There's been prior testimony, Dean,—you were not here—that you hear three little beeps, and I've been noticing the three little beeps before on ESPN or the CNN, this type of network. What does that indicate is coming up?

A. Many of the cable systems technically use an automated system for providing the cable and the advertising inserts where they'll have a videotape machine with the commercial already on it, sitting there unattended, no human being. And the three beep tones that come down

from ESPN are actually tones that start that machine moving and insert that commercial then in place of it. ESPN actually triggers the commercial itself as it goes on. And the three tones are what switch away from ESPN to the local commercial, and at the end, there will be three more tones that will take it from the local commercial back to ESPN.

Q. Those commercials, the local station actually receives a payment for it?

A. Yes, that's correct.

Q. Do you receive part of the national advertising that's done on ESPN or the other stations?

A. No, we receive no split from the national commercials. We sell our own national advertisers. In other words, there will be—we have representatives in New York that will go to a large national advertiser, such as Chrysler, not the local Chrysler dealer, but the national advertiser Chrysler, and say, "We would like to sell you time on ESPN in [991] West Memphis, Arkansas." We receive all that money. But for the national Chrysler spot that airs nation wide on ESPN, we receive no—no portion of those funds.

Q. In your seventeen years in the cable business, have you also been involved with the print media in mass communications, in the sense of magazines and newspapers or people who work in one of the other systems with you?

A. Well, my early training, of course, was in journalism, and I have had personal experience in working, prior to joining the cable industry while I was going through college and worked for—have done several print publication-type things on a small basis. Recently, we had a good example where our operations manager in West Memphis, Arkansas, for the last couple of years, a gentleman by the name of John Wood. We hired John as our operations person from the local newspaper. He was a reporter for the local newspaper in

West Memphis. Became our operations person and did both local programming and other programming for us on the system there, as well as marketing and public relations. John recently left our operation in West Memphis and is currently—went to work as an editor for a newspaper in Memphis.

Q. Do you have any personal experience with regard to ownership or operation by the same entity of broadcast stations and cable stations?

A. There is a restriction, federal restriction, against broadcast ownership of cable television systems. However, early on, I went to work for a cable system that was just starting in Rockford, Illinois, and it was the first cable system that was certified by the F.C.C. in an [992] urban market. And at the time, the company I went to work for owned the CBS broadcast station in Rockford, Illinois. And because of this ownership restriction, was told that they had to sell one of the properties, either the cable system or the broadcast station, and ultimately, after a number of appeals, decided to sell the broadcast station.

Q. And retain the cable system?

A. Yes, that's correct.

Q. In your programming choices for cable television, are there any comparisons, in your opinion, between the cable broadcast and the dissemination of information in the print media in your locale?

A. Yes, I believe there is. Just generally on the surface, I can tell you for example that my company has a number of major companies which are stockholders in our operation. One of our largest stockholders is a company called Time, Incorporated, which, of course, is a major publishing company, nation wide across the United States, publishers of Time Magazine and Sports Illustrated and Life Magazine and

numerous other publications. I know that Time Magazine—or Time Incorporated is in my operation as a stockholder and the second largest cable operator in the United States. And I know that is because that there is a close synergy between their publishing companies and cable television. As a matter of fact, several years ago, Time sold off most of their companies that they owned that were not in that specific line of business. They owned forest product companies. They owned packaging companies and market research and decided they wanted to strictly be in companies that [993] disseminated information, entertainment, and are strictly today in the publishing and cable television business. I guess in addition to that, in my decision making process in trying to determine programming for the different franchises that we operate, I feel my job is very similar to some of the folks on the magazine side who I have had contact with.

Q. In your determination of programming, what types of programming are available? I think there are eighty or a hundred separate programs that could be carried. So if you have a thirty channel, you have to make some discretion or some decision on what you're going to carry.

A. Right.

Q. What factors go into that exercise of that discretion?

A. Well, right off the bat—off the top, there are legal factors. There are certain amounts of programs, different types of programming that we are allowed or can carry. There are only a certain number of—certain types of stations that we can carry. There are cost factors of what the costs of the programming would be. It is very important that we try to match programming to a specific community. We carry Razorback sports in our operation in West Memphis. We do not carry Razorback sports in Memphis, but we would be foolish not to carry Razorback sports in our operation in West Memphis. Again, there are a number of factors, from

business related factors to ratings and audience interest factors, that we have to take into consideration.

* * *

[994] Q. From your experience in the print media and your association with the print media, would an editorial decision or a decision on what to publish in the print media of a magazine be similar to the decisions that are made by you in the programming that are carried on cable television?

MR. MORPHEW: Your Honor, I renew the objection. That is just—whatever he might say and that would be primarily based on speculation and what he thinks and what somebody else might do, but it wouldn't be of his own knowledge.

THE COURT: Well, his own testimony earlier was he takes into consideration your preference and economics as one of the prime considerations. I'll let him answer the question.

A. I can answer that two ways. Yes, I think that the contact that I [995] have with other members of our corporation that are strictly on the print side of the business, I find that my job is very similar to the decisions that they have to make. In addition, I did work for two years as managing editor of a nightly news program, and many of the decisions that I made in putting together the nightly 6:00 and 10:00 newscast on the appropriate amounts of hard information versus soft entertainment versus sports versus weather are the same types of balances that I must make programming, not for the 6:00 and 10:00 news, but programming for long-term on my customers where I have an entire channel that I'm trying to program or thirty channels that I'm trying to program rather than thirty minutes at 6:00 at night.

* * *

Q. Is there a similar—let me ask you this. Is there a similarity between the type of information, entertainment, and advertising that is distributed by the Readers Digest, as an example of one publication, and [996] the type of information, entertainment and advertising that's disseminated on a mass communication basis by your cable television systems?

MR. MORPHEW: It seems to me that that's asking for a legal conclusion in a matter that the Court will have within its own power to answer.

THE COURT: Well, he can have his opinion. But, of course, that is one of the ultimate issues here.

MR. SAYRE: It is one of the ultimate issues, Your Honor, but I think that we are simply trying to draw factually the analogy between—

THE COURT: (Interposing) What you're asking is for his opinion. That's fine. He can have one.

BY MR. SAYRE:

Q. Do you have an opinion?

A. Yes, and I do see similarities. The Readers Digest contains information that they have purchased from other sources and reprint it as we purchase programming which is from other sources and rebroadcast it. Readers Digest has information that they produce themselves, write themselves, as we produce local information and entertainment programming ourselves on the cable system. They have national advertising that is in all their additions. Like most magazines, I'll make the assumption that they have regional editions where local advertising can go into the Readers Digest, just as local advertising is inserted on a cable system. So I see a number of similarities between [997] that. And, in addition, with my own stockholder, Time, Incorporated, I

know their philosophy on providing magazines is very similar to cable television. They want to provide Time Magazine for hard-core weekly news buffs. They want People Magazine for entertainment and the light side of the news. They want Sports Illustrated for those people that want sports information. They want Southern Living for those folks that want cooking or home entertainment information. Very similar to the different channels that we would broadcast on the cable system.

Q. That's what I was going to ask you. Can you draw an analogy to specific programming or channels that are carried then by cable television to those specific examples?

A. Yes, we do the same thing because unlike a broadcast television station that has only one channel and twenty-four hours a day and has to figure out how to segment that channel to be sure that they have a little bit of weather, and a little bit of news, and a little bit of local programming, and a little bit of sports, and a little bit of game shows, cable television, with our multiple channels, have the ability to carry channels, total channels, twenty-four hours a day of this same information. it is very similar.

Q. What would you broadcast that is similar to Sports Illustrated?

A. Sports Illustrated and ESPN, of course, are very similar.

Q. What about Time?

A. Time Magazine and Cable News Network, very similar. People Magazine and, not necessarily entire channels, but the light entertainment that we have on a number of our channels. As a matter of [998] fact, our company has recently entered a program where we are selling common advertising between our magazines and the cable television systems. In other words, they'll go to Time

Magazine advertising sales people will be repping the Toyota people nationally and say, "We want you to take out a full page ad in Time Magazine, and at the same time we will give you X-number of thirty second commercial spots on the cable system in Memphis, Tennessee, or West Memphis, Arkansas. So we have combined the resources of the two in order to reach a large number of people.

* * *

CROSS EXAMINATION

BY MR. MORPHEW:

Q. Mr. Deyo, when you indicated the factors that go into determining which programs you will carry on your cable, on a particular cable system, after mentioning that you tried to keep your personal taste out of the decision because you didn't think that was relevant, you mentioned, first of all—excuse me, you mentioned then customer surveys and Arbitron ratings, which—both of which would indicate what viewers wanted to see.

A. Yes, that's correct. Arbitron would indicate what viewers are watching, not what they want to see.

Q. What they are watching. Then you indicated the cost to your [999] company of, I guess, purchasing the programs or getting the programs out to the people? And then you mentioned also that you would try to get for the Arkansas system programs that Arkansas people would want to watch, such as, I think you said, Razorback football and some others. And also you tried to achieve a balance. When you say you try to achieve a balance, isn't that just another way of saying that you're trying to get something that a whole lot of people will like? Or a bigger cross section of people will like?

A. There's probably other reasons why you would create a balance too. You don't want to—you want to—as was mentioned earlier, with the number of channels that are available to be carried, and with only thirty channels of programming to be programmed, you want to make sure that the balance that you're going after, yes, number one is what the customers will accept, but also what the company feels good about. In our West Memphis operation, we carry three PBS stations, and we feel that is a heavy slant toward PBS and are currently in the process of eliminating one of them in order to get a better balance in our program mix.

Q. Let me ask you this. If according to one of your surveys or according to your view of the Arbitron ratings it was determined that two or three people, or no one wanted to watch PBS in your area, would you carry it?

A. Yes, we would. We would at least carry one PBS in the area. That's part of our balance.

Q. As opposed to carrying a program that would otherwise be available [1000] to provide that people did want to see?

A. Yes, we on regular basis do not listen to the surveys that we get and impose our own. Sometimes we feel we're smarter than what the information comes back on the survey. So yes, we do not always—

Q. (Interposing) Smarter than your viewers?

A. Yes, that's correct. We do not always take the information that's there. The number one channel that comes back requested on the survey, we do not currently carry at this time.

THE COURT: Well, a good example of that, and it would not necessarily be on cable, would be Hill Street Blues. They kept trying to take it off, and people kept screaming. The

machines kept saying nobody is watching it, but every time they tried to cut it, they'd get a rift of pressure to keep it on. They went four or five more years.

A. The majority of my subscribers are very heavily into three areas, movies, sports and information-type programming, but at this point in time, only fifty percent of the people that I have a cable going by subscribe to my programming. So, something is not encouraging those other fifty percent to subscribe. A better balance of programming, regardless of what the current surveys say, might be in a bit of interest to the company. We have carried programming before that customers have objected to. We've carried programming before that customers have strenuously held rallies. We have one group picket our Memphis operation every Saturday for a year. We have had requests from the city of West Memphis to carry programming that we do not currently carry at [1001] the moment. There are a number of things that go into that program decision. Customer reaction and taste is one of those opinions.

Q. The primary consideration?

A. In some cases, perhaps, but, no, I mean my experience has been not necessarily the primary.

Q. You're in the business to make money, right?

A. That's right, we are a business.

Q. You make money by selling cable t.v. to customers?

A. Yes, that's correct. But, again, just because a customer wants a certain program does not mean it's in the best interest of the company to carry that program.

Q. I think you—you can re-educate me if you need to, but I think you said your personal experience with respect to the print media was confined to some part-time work in college?

A. Yes, that's correct.

Q. You made the statement that you knew what Time magazine wanted to do in its particular publications. So you don't have any personal knowledge of that, do you? I mean, you haven't had—has Time magazine, for instance, consulted with you or shared with you its decision making process in what they publish?

A. Yes, I'm a senior executive, and although I'm not on the board of directors of Time, Incorporated, I'm a senior manager of Time, Inc., yes.

Q. Okay, and you know, from your own personal knowledge, what they try to do with their particular publications?

[1002] A. I am informed of the philosophy of Time, Incorporated on their publications, yes.

Q. You thought or you indicated that you thought there were similarities between publications and what you do, as in cable television?

A. Yes, sir.

Q. It's also true, is it not, that there are many similarities between what you do and what broadcast television does? I know you pointed out the dissimilarities. For instance, cable television rebroadcasts or retransmits much of the same type of entertainment programming that broadcast television does, does it not?

A. There are many similarities between cable television and broadcast television, yes, sir.

Q. Going back to this stock—Time, Incorporated being one of your stockholders. You said there was some close—I

think the term you used was synergy—between publications and cable t.v. What did you mean by close synergy?

A. Time, Incorporated considers the cable business to be very closely related to publishing a magazine.

Q. You also indicated that Time magazine or Time, Incorporated was into other ventures before it decided to limit itself to two areas. And as someone with knowledge of Time, Incorporated, I suppose I can ask you then it is also a major concern of Time, Incorporated in what ventures it gets into? The major concern is what is most profitable to it?

A. As a publicly owned company, Time would be very concerned about [1003] profitability, yes, sir.

Q. So if cable t.v. was a profitable enterprise for it to get into, it wouldn't necessarily require any closeness in philosophy?

A. It wouldn't necessarily require that. Although, Times' philosophy is that it have a close synergy.

* * *

REDIRECT EXAMINATION

BY MR. SAYRE:

Q. Gene, one question with regard to the programming. No matter what type, who has the final determination of what programming is chosen to go on the cable systems?

A. The final determination is mine.

Q. So, it's left to the cable operator?

A. That is correct.

* * *

TESTIMONY IN BEHALF OF THE DEFENDANTS:

MR. MORPHEW: Gail Price, Your Honor.

[1004] *GAIL PRICE*, a witness called in behalf of the Defendants was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MORPHEW:

Q. Gail, you testified at the hearing on the Motion For Preliminary Injunction in this matter?

A. Yes, I did.

Q. You are the manager of Arkansas—the sales and use tax section within the Arkansas Department of Finance and Administration?

A. That's correct.

* * *

Q. You are familiar in your capacity as the manager of sales and use tax section with what property and services upon which tax is collected and remitted to the State of Arkansas?

A. Yes, I hope so.

Q. You are in charge of administering the office which receives and processes those collections and reports, is that correct?

A. Yes, that's correct.

Q. Of the property upon which tax is collected and paid to the State of Arkansas, does that include the sale of books?

A. Yes, basically.

Q. Does that include the sell of magazines, publications that are sold [1005] over the counter?

A. Yes.

Q. Does that include the sell of video cassette recorders? A. Yes.

Q. Video cassette tapes? A. Yes.

Q. And those tapes include any tapes, whether it be for a movie or a documentary or an information program or whatever?

A. Yes, that's correct.

Q. Does that property upon which the Arkansas sales tax is collected and reported and remitted to the State of Arkansas include the equipment and materials purchased by a satellite dish owners? A. Yes.

Q. Does that include the equipment and materials purchased by those who would watch wireless radio or television, broadcast television? A. Yes.

Q. The taxes which your office administers—the sales tax, the general sales tax in the State of Arkansas—how long have you been in your office? A. Fifteen years.

Q. Fifteen years? And how long have you worked for the Department of Finance and Administration? A. Twenty years.

Q. You are familiar through all of your work and through your contacts and meetings and consults with everyone in the revenue [1006] administration. You are familiar with how long Arkansas has had a sales tax? A. Yes.

Q. How long is that?

A. Well, they—I think the temporary one first passed in '35, and tnen '41 was when the permanent law we're working under right now for sales tax is concerned. The complimentary use tax in '49.

Q. Over the years since the enactments of that sales tax act, many services have been subject to the sales tax, the general sales tax in Arkansas, is that correct? A. Yes.

Q. Those services include the service of providing natural and artificial gas to utility customers? A. Correct.

Q. Include the provision providing of electricity service to utility customers? A. Yes.

THE COURT: Telephones.

MR. MORPHEW: I guess I could just go through a list, Your Honor.

Q. Telephone, water, ice, steam?

A. Yes, that's correct.

Q. As a matter of fact, any other utilities of public service would be subject to the tax, is that correct, as a matter of the statute, except for—except for, I think the exceptions are transportation services, [1007] sewer services, and sanitation? A. Yes.

* * *

BY MR. MORPHEW:The service of furnishing hotel rooms is taxable in this state, is it not?

A. Yes, sir. Yes, it is.

Q. Now, and for a long time, the service of altering, refinishing, repairing numerous items of property has been subject to our sales tax, is that correct?

A. Yes, that particular law, I think 214, went in in '71.

THE COURT: Most fouled up set of statutes that ever passed.

Q. That includes the repair of motor vehicles, aircraft, farm machinery, motors, tires, batteries, rugs, upholstery, boats, radios, jewelry, watches, all of those things?

A. That is correct.

* * *

[1008] BY MR. MORPHEW:

Q. Is the service of printing subject to our sales tax? A. Yes, it is.

Q. The service of photography? A. Yes.

Q. Do—is the tax collected and reported and remitted on the sales of tickets or passes to places of amusement, recreation, or entertainment? A. Yes.

Q. Those include tickets to theatres? A. Yes.

Q. They include tickets to movies? A. Yes.

Q. To athletic events? A. Yes.

Q. And to any recreational or entertainment activity? A. Yes, basically.

Q. Is the tax collected, remitted or reported on the service provided by broadcast television stations, Channels 4, 7 and 11?

A. No, there's no tax on those—there's nothing to base a charge on I would assume in that case.

THE COURT: What was the question again?

Q. Whether the gross receipts or sales tax is collected and reported with respect to any service provided by a broadcast television station?

THE COURT: Television advertising, is it taxed? A. No.

[1009] BY MR. MORPHEW:

Q. No advertising is taxed, is it? Is the advertising charged by cable television taxed?

A. Probably not, no.

Q. But the service or providing television reception by the broadcast station is—no tax is collected on that?

A. There's nothing to base your tax on in this case.

Q. It's your understanding that the gross receipts tax is based upon just that, the gross receipts or gross proceeds received from a sale?

A. Yes, that's pretty clear.

Q. And is your understanding that there is no sale in such an instance that I just mentioned?

A. That's correct.

Q. Were you a part of and did you participate in any meetings concerning taxation of cable television services in your tenure as sales tax manager?

A. Yes, back about eight or ten years ago, we considered taxing it. We thought we had authority under the law at that time. Memos were written and discussions held, and, of course, it never did get off the ground, but it was discussed at several points.

Q. It was considered—or it was considered in that framework to be a taxable service already within the law as it existed?

A. Yes, that was the discussion.

Q. Are you aware of the decision making that went into specifically amending the sales tax law to add cable television as a taxable service, [1010] and why that was done? Why it was done in that fashion?

A. Well, it was just considered another service. I wasn't in on the final decision making, but it was discussed, and we just felt like it was another service that was taxable, and, therefore, they decided to—they didn't want to end up somewhere like this, so they waited and had the Legislature change it, you know, making it designated as a service.

Q. So that it would be clear that it would be included within the statute? A. Clear, yes.

Q. In your participation in those meetings and discussions with other personnel, was there ever any indication or statement made that cable t.v. was going to be singled out for special tax treatment?

A. No, it was just another service that they were trying to, you know, make taxable.

* * *

CROSS EXAMINATION

BY MR. SAYRE:

Q. Gayle, the statutory scheme for taxing the gross receipts or sales tax and compensating use tax provides that all tangible personal property is subject to the tax with certain exemptions. Is that correct? In other words, the statute says the sale of all tangible personal property shall be subject to the tax?

A. Yes, it just states, you know, just definitely tangible personal [1011] property.

Q. So the sale of any tangible personal property, whether it be a t.v. set, a decoder, an automobile, an above ground swimming pool, whatever it is, is covered unless it is specifically exempt?

A. That's correct.

Q. But the same does not apply to services under the Arkansas statutory scheme, does it?

A. No, they have to be specifically designated as taxable services.

Q. And only those services that are specifically enumerated in what's now Arkansas Code Section 26-52-301, I believe it's 3, and there's an A, B, C and D. Those are the four types of services that are covered?

A. I will have to take your word—

Q. (Interposing) Certainly, if you'd like to take a look at the—

MR. MORPHEW: (Interposing) I think Your Honor can see how the statute is set out. I think more than four types of services set out.

A. Yes, it runs from 26-52-301 all the way through that, yes, through D.

Q. Through D. It's A through D are these types of services? A. Yes.

Q. We went through a number of utility services, like electric, gas, telephone, water, ice and steam. To your knowledge, none of those have first—or claimed First Amendment right protection, do they?

A. There haven't been any lawsuits filed.

Q. You haven't seen those?

* * *

[1012] Q. The satellite broadcasts that we had described in the first hearing and also described today by Mr. Gardner, that he acts as the agent in providing that service and collecting the money. That is not subjected to tax under one of these criteria of A through D of Subsection C of the statute, is it?

A. So far, I haven't found a way to get it under there, but—(pause)

Q. But you're still looking?

A. We may make it.

Q. That's similar to your looking eight to ten years ago at cable television and finally determining it was not specifically a taxable service, is that correct?

A. Basically the same, yes.

Q. So, the satellite broadcasts through the local cable system, as a collecting agent, is not subject to tax in the State

of Arkansas at this time and has not been subject to tax by Act 188 of 1987?

A. You're talking about the similar to—

Q. (Interposing) To the cable delivery I'm talking about the satellite delivery that's collected for by the cable company.

[1013] A. No, that's correct, yes.

Q. So Mr. Gardner's testimony that he imposes the tax upon the delivery of those services by cable is a correct interpretation of the law as far as you are administering the law?

A. Yes.

Q. His not collecting the sales tax upon delivery of those services when he collects from the dish—the dish delivery, he is also correctly administering the law by not collecting the tax?

A. I think that would be a good assumption, yes.

Q. The radio and television broadcast services or their advertisement for the—to pay for those services are not subjected to tax in the State of Arkansas, are they?

A. No, there's no charge made on them, you know, so there would be no tax collected.

Q. There is no tax imposed—no sales tax imposed upon the sale of newspapers in the State of Arkansas, is there?

A. That's correct.

Q. There's a specific exemption from the sale of that type of tangible personal property.

A. That's correct, yes.

Q. There is also no tax, no sales tax imposed or no use tax imposed upon magazines of any nature that are sold by subscription, is that correct?

A. As long as it's by subscription, yes, they're not taxable.

Q. That is a change within the last two years, is that correct?

[1014] A. That's correct, yes.

Q. Part of that was dependent upon the action of the United States Supreme Court in the case of Arkansas Writers Project striking the tax on the Arkansas Times Magazine?

A. That's correct, yes.

MR. MORPHEW: I think we'd stipulate that that entire change was brought about by the decision of Arkansas Writers Project.

MR. SAYRE: I believe—

THE COURT: (Interposing) What was the tax imposed there?

MR. SAYRE: The sales tax.

THE COURT: On all sales?

MR. SAYRE: All sales of the magazine by subscription.

THE COURT: By subscription?

MR. SAYRE: Yes.

THE COURT: But it went off on equal protection, didn't it?

MR. SAYRE: No, First Amendment.

MR. MORPHEW: Your Honor, in the Arkansas Times case, the question—or the problem in that case was that the tax was collected with respect to certain publications based on their content, and certain others were not subject to tax based on their content. In other words, whether they were a trade, sports, or religious journal, so that the Court said that the distinction was on a content oriented basis and, therefore, could not be sustained.

MR. SAYRE: I believe those are issues I need to address in argument—in brief Your Honor, but it's the First Amendment.

[1015] BY MR. SAYRE:

Q. I would hand Mr. Price what's been marked as Plaintiffs' Exhibits Number Twelve and Thirteen and ask if he could identify those please, sir.

A. Number Twelve is a discriminative policy statement 188--1988-1.

Q. And Number Thirteen is the same revenue policy statement 1988-3?

A. 3, yes. The first one was—

Q. (Interposing) Excuse me, Mr. Price, would you describe for the record please, what is a revenue policy statement?

A. It's just as it says. It's just a statement issued by the Revenue Department. Department of Finance and Administration, and it's Revenue Division. Any time a

change takes place in the law where it requires a statement to be issued—

Q. (Interposing) As to how the law would be administered?

A. As to how the law would be administered.

Q. Would you then describe what Exhibit Number Twelve, revenue and policy statement 1988-1, what change was made in the law?

A. This is concerning the writers project, and all it says is basically as you go to the decision, subscription sales of publications are no longer subject to the Arkansas tax.

Q. I believe it says, "As a result of the Supreme Court decision, subscription sales of publications, regardless of the type or content of the publication, or the place printed or published, are no longer subject to Arkansas sales or use tax." Is that correct?

A. That's what it says, yes.

[1016] Q. Exhibit Thirteen is a further delineation of what is a sale by subscription? A. Yes.

Q. For purposes of implementing revenue policy statement 1988-1?

A. Yes, that's correct.

Q. They were issued on March 10, 1988, and March 30, 1988, respectively? A. Yes.

* * *

Q. Prior to that time, were you collecting—was the state collecting sales tax on magazines published in Arkansas, Mr. Price?

MR. MORPHEW: Your Honor, I guess if I was going to object to the relevancy of what's currently the state of affairs, I would certainly object to the relevancy of what went on prior to the laws that now exist.

[1017] MR. SAYRE: Your Honor, what I'm trying to determine for the records of this record, is that the time this suit was filed in May of 1987, there was—shortly after the Arkansas Writers Project decision was rendered. I'm trying to ascertain what the status of the law was then as its administration, and how it has evolved until the date of trial with regard to the sale of magazines which we claim are also First Amendment protective rights, and I think I have a First Amendment protective rights very similar to cable television services broadcasts.

THE COURT: I guess the real issue is what is the stated law today? There is on their books statutory law from the Legislature that says this service shall be taxed.

MR. SAYRE: Yes, but there are—there are interpretations—

THE COURT: (Interposing) Now, his policy or lack of policy has nothing to do with it. They're collecting it, I assume. They're here defending it, and you're here saying that it is unconstitutional.

MR. SAYRE: With regard to cable television. But with regard to the similar types of mass communications, there has been a substantial change made during the pendency of this action.

THE COURT: What has the substantial change been?

MR. SAYRE: The revenue—and perhaps I can make a statement and Mr. Morphew and Mr. Price can either agree or disagree. Mr. Morphew, probably would disagree, but that at the time the suit was filed. The Arkansas Times was a

magazine published in Arkansas that [1018] specifically had the tax stricken from it by that decision in the Arkansas Writers Project. In June of 1987, which is Plaintiffs' Exhibit Seven, there was an attempt to repeal the exemption that was found to be the problem or the core of the problem on the content based publication in the Arkansas Writers Project case during the first special session. That bill was defeated to remove the exemption. Subsequently, the Revenue Division, in its interpretive policy, has stricken the application of b-oth the gross receipts tax from magazines published in Arkansas and sold by subscription and the compensating use tax, which is the companion tax, from magazines that are published out of state and sold by subscription. At the times, Mr. Price testified before, I believe he indicated that magazines sold out of state—published out of state and sold by subscription into Arkansas were subject to the compensating use tax. There has been a change in the law as of March 10, 1988, or the administration law.

THE COURT: Is that correct?

A. Yes.

THE COURT: That is now the state of the law as y'all understand it?

MR. MORPHEW: The state of the law is now that if it's published and sold by subscription—if it's a publication, and it's sold by subscription, it's not subject to tax. We would point out though that, again going to the relevancy, it appears that the writers project case was decided before anything ever happened in [1019] this lawsuit.

MR. SAYRE: That is correct.

MR. MORPHEW: So, what the current state of the law is is what the law is and has been since the inception of this lawsuit.

THE COURT: You may proceed.

BY MR. SAYRE:

Q. So, the only tax imposed is the sales tax imposed upon magazines sold over the counter, whether they're published in this state or not?

MR. MORPHEW: Would you ask that again, Gene?

Q. The only type of magazine that is subjected to a tax on its sale in Arkansas now is the sale of magazines over the counter as opposed to by subscription?

A. Yes, the way I understand this decision, it didn't affect anything other than the subscription sales. Everything is still taxable.

* * *

[1024] BY MR. SAYRE:

Q. Mr. Price, the Snyder Corporation here provides ARN, a new service—agricultural service that is beamed by satellite from Little Rock to various stations around the state for a fee. Since that's delivered by satellite, is there any tax imposed upon that service by the revenue department?

A. There's no charge on which to base a tax on.

THE COURT: Are you talking about Lowell Rufcorn?

MR. SAYRE: Yes, sir, Lowell Rufcorn.

THE COURT: Isn't that a lovely name for a farm guy, Lowell Rufcorn?

BY MR. SAYRE:

Q. The service—there's a charge for that service to each individual station? Did you know that there are sports news carried on small radio stations across the state through this ARN Network, which for a service fee provides those radio broadcast services? There's no tax imposed by [1025] the Revenue Department upon those services provided by the Snyder Corporation, to your knowledge?

A. Not to my knowledge, no.

Q. And there wouldn't be under the law as it now exists and administered by you? A. No.

* * *

REDIRECT EXAMINATION

BY MR. MORPHEW:

* * *

Q. Gail, its also true that we don't—the cable television companies do not pay and we don't collect from them a tax on the satellite services they receive, is that correct?

A. That's correct.

Q. The satellite services that they receive from whatever satellite company they pay for free of tax, free of sales tax, is that correct?

A. That's correct, yes.

* * *

PLAINTIFF'S EXHIBIT 2
(8-18-87)
[825-826]

NATIONAL CABLE TELEVISION ASSOCIATION
ncta

SCRAMBLED CABLE SERVICES AVAILABLE

Service Phone Number	Cost
Cinemax 1-800-426-3474	$ 12.95/month; $116.55/year; $ 9.98/month when purchased with HBO; $ 7.48/month when purchased with HBO at yearly subscription rate
CNN & CNN Headline News 1-800-843-9266	$ 25.00/year
ESPN 1-800-422-9000	$ 24.96/year
HBO 1-800-426-3474	$ 12.95/month; $116.55/year; $ 9.98/month when purchased with Cinemax; $ 7.48/month when purchased with Cinemax at yearly subscription rate
Showtime 1-800-422-9000	$ 10.95/month; $120.00/year; $ 8.48/month when purchased with TMC; $ 7.75/month when purchased with TMC at yearly subscription rate

The Movie Channel 1-800-422-9000	$ 10.95/month; $120.00/year; $ 8.48/month when purchased with Showtime; $ 7.75/month when purchased with Showtime at yearly subscription rate
Discount Satellite Programming CNN, Headline News, CBN 1-800-843-9266	1 year free with the purchase of an integrated receiver/ decoder from Echosphere or Houston Tracker. $31.95/year for subsequent years or without IRD purchase
HBO Package HBO/Cinemax/ CNN/Headline News 1-800-426-3474	$ 12.95/month for HBO or Cinemax; $ 19.95/month both; $ 7.48/Month each premium service when purchased together at yearly subscription rate; $ 25.00/year for CNN and Headline News

National Cable Television Association •
1724 Massachusetts Avenue, N.W. •
Washington, D.C. 20036 • (202) 775-3550

Viacom Satellite Networks Showtime/The Movie Channel CNN Headline News, ESPN (Christian Broadcast Network, MTV, VH-1, Discovery Channel, Nickelodeon, Learning Ch. Lifetime, Nashville Netwk, and USA Network will be included in the basic pkg.	$ 10.95/month for Showtime or TMC; $120.00/year for Showtime or TMC; $ 16.95/month both premium services; $ 7.75/month each premium service when purchased together at yearly subscription rate; $ 10.95/Month basic service package; $120.00/year basic service package; $ 7.00/month for basic service package with subscription to Showtime or TMC; $ 16.00/Month for basic service

at these prices as the services are scrambled.) 1-800-422-9000

package *and* Showtime or TMC when purchased at yearly subscription rate

7/30/87

PLAINTIFF'S EXHIBIT 3
(8-18-87)
[827-830]

UNSCRAMBLED PROGRAMMING SERVICES

ABC Network
Alaska Satellite TV Project
Local & network programming
America's Market Place
TV shopping
America's Value Network
24-hour shopping
American Christian TV (ACTS)
Southern Baptist Convention
American Movie Classics
Classic American movies
Armed Forces Satellite Network
Network and independent programming for military
Arts & Entertainment
Black Entertainment TV
Boresight
TVRO industry news, Thursdays, 9 PM (E)
Bravo
Cultural service, movies
C-Span
Live and taped coverage of US House
C-Span II
Live and taped coverage of US Senate
Cable Value Network
TV shopping
Caravan of Values
1 am to 5 pm (E)

Caribbean Superstation
Variety
CBC (Atlantic/North)
Canadian Broadcast Company feed to Atlantic/Mountain Time
CBMT
Canadian Broadcast Company feed to Eastern Time
CBS Network (West
5 feeds
Christian Television Network
Religious programs
Consumer Discount Network 1 & 2
TV shopping
Country Music TV
Country music videos
The Discovery Channel
Family entertainment, education and specials
The Disney Channel (East/West)
Family entertainment
Eternal Word TV
Catholic programming
Financial News Network/Score
Financial/sports review
Fox TV Network
Galavision
Spanish programming
Health Information Network
1-3 pm (E) weekdays
Hispanic Broadcasting Network
News in Spanish, Monday-Friday, 6:30 pm (E)
Hit Video USA
'Round-the-clock video
Home Shopping Network 1
Shop-by-phone, 24 hours daily
Home Sports Entertainment (Houston)
Astros, Rockets
Home Team Sports
Baltimore, Washington, professional and amateur sports
House of Commons (English)
Parliamentary coverage

House of Commons (French)
Parliamentary coverage
International Television Network
Syndicated programming from Australia and Europe
JISO (Japanese)
Feed from US to Asia
KFMB, San Diego
CBS affiliate
The Learning Channel
Liberty Broadcsting Network
Religious programming
Lifetime
Health, crafts, cooking, exercise, interview
Lifeway TV Network
Shopping
Madison Square Garden (NY)
Professional and amateur sports, entertainment
The Meadows
Sulkie racing, Meadows Racetrack, PA
MuchMusic
Music videos
Music Television (MTV)
Rock Videoclips, concerts
The Nashville Network
Country entertainment, interview, sports
National Jewish TV
Jewish programming
National Shopping Club
TV shopping, 24 hours daily
NBC Network (East)
NCN
Religious programming
The New England Sports Channel
New England Sports Network
Nickelodeon (West/East)
Educational & entertaining children's programming, 24 hours daily
Nostalgia Channel
Old-time TV, films, news

People That Love (PTL)
Religion
Playboy Channel
Adult entertainment
Prime Ticket Sports
Southern California
Pro Am Sports Network
Michigan, Ohio, Indiana, Detroit Tigers
PBS (A)
Educational
PBS (B)
Educational
PBS (C)
Educational
PBS (D)
Educational
Rock Christian Network
Music videos, religious, 24 hours daily
The Satellite Show
TVRO news program, Tuesday 9 pm (E), Saturday 12 pm (E)
Shop-At-Home
TV shopping, 18 hours daily
The Silent Network
Programming for the deaf
Sky Merchant
TV shopping
Sports Channel
NY sports area
SportsVision (Chicago)
White Sox, Bulls
TelShop
TV shopping
Tempo Network
Variety
Three Angels Broadcasting
Religious
Travel Channel
Trinity Broadcasting Network
Religious

University Network
Religious, Dr. Gene Scott
Univision
USA Network (East/West)
Variety
Video Hits-1 (VH-1)
Music videoclips
The Weather Channel
'Round-the-clock weather
World Satellite Television Network
Syndicated programming
Worldwide Television Network
European news feeds 11:45 am (E) weekdays
XEW, Mexico City
XHDF, Mexico City
XHITM, Mexico City

PLAINTIFF'S EXHIBIT 7
(8-19-27)
[835-836]

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DEFENDANT RAGLAND'S RESPONSE TO PLAINTIFFS' FIRST REQUESTS FOR ADMISSIONS
(Filed August 17, 1987)

Comes H. G. Price, Manager, sales and Use Tax Section of the Revenue Division for the State of Arkansas and for his Response to the First Requests for Admission states:

REQUEST FOR ADMISSION NO. 85: Attached hereto as Exhibit C is a true and correct copy of House Bill No. 1031 introduced on June 2, 1987,, by Representative Hays during the First Extraordinary Session of the 76th Arkansas General Assembly.

RESPONSE TO REQUEST FOR ADMISSION NO. 85: Admit.

* * *

REQUEST FOR ADMISSION NO. 87: House Bill No. 1031, attached hereto as Exhibit C, was considered and voted as "do-pass" recommendation by the Committee on Revenue and Taxation of the Arkansas House of Representatives on June 2, 1987.

RESPONSE TO REQUEST FOR ADMISSION NO. 87: *Admit.*

* * *

REQUEST FOR ADMISSION NO. 89: House Bill No. 1031, attached hereto as Exhibit C, was considered by the members of the House of Representatives of the Arkansas General Assembly on June 3, 1987, and House Bill No. 1031 was defeated by a formal vote of 20 "for" and 61 "against" on that date by the House of Representatives of the Arkansas General Assembly, First Extraordinary Session of the 76th General Assembly.

RESPONSE TO REQUEST FOR ADMISSION NO. 89: Admit.

* * *

VERIFICATION

State of Arkansas

County of Pulaski

The above and foregoing is true and correct to the best of my knowledge, information and belief.

/s/ H. G. Price
H. G. Price, Manager
Sales & Use Tax Section

State of Arkansas

County of Pulaski

Subscribed and sworn to before me this 17th day of August, of 1987.

/s/ Phyllis J. Grigsby
Notary Public

My Commission Expires:

3-18-90

The objections to the foregoing are proper under Arkansas Rules of Civil Procedure and made by me this ____ day of _____, 1987.

/s Wayne Zakrzewski
Wayne Zakrzewski, Attorney
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, Arkansas 72203
(501) 371-2451

(CERTIFICATE OF SERVICE omitted in printing)

EXHIBIT C
[837]

A BILL

State of Arkansas
76th General Assembly
First Extraordinary Session, 1987 House Bill 1031
By: Representative Pat Hays

FOR AN ACT TO BE ENTITLED

"AN ACT TO REPEAL THE EXEMPTION FROM THE ARKANSAS GROSS RECEIPTS TAX FOR THE SALE OF RELIGIOUS, PROFESSIONAL, TRADE AND SPORTS JOURNALS AND/OR PUBLICATIONS; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. The exemption from the tax levied by the Arkansas Gross Receipts (Tax) Act levied by Act 386 of 1941, as amended, the same being Ark. Stat. Ann. §84-1901 et seq. which exempts from that tax the gross receipts or gross proceeds derived from the sale of religious, professional, trade and sports journals and/or publications printed and published within this State when sold through regular subscriptions which exemption was granted by the second paragraph of Section 1 of Act 152 of 1949, the same being the second paragraph of Ark. Stat. Ann. §84-1904(j) is hereby repealed.

SECTION 2. REPEALER. All laws and parts of laws in conflict herewith are hereby repealed.

PLAINTIFF'S EXHIBIT 12
(5-9-88)
[887]

DEPARTMENT OF FINANCE AND ADMINISTRATION
REVENUE POLICY STATEMENT 1988-1

In the case of Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. ____, 107 S.Ct. ____, 95 L.Ed. 209 (1987) the United States Supreme Court declared that the Arkansas Sales Tax Exemption for subscription sales of certain publications was unconstitutional. The Supreme Court held that because the

exemption discriminated between types of publications on the basis of content the exemption violated the first amendment right to free speech. As a result of this Supreme Court decision, subscription sales of publications, regardless of the type or content of the publication or the place printed or published, are no longer subject to Arkansas sales or use tax. The Revenue Division will no longer assess tax on subscription sales of these publications and taxpayers will no longer be required to report tax on purchases of these publications.

This Policy Statement shall be in effect on and after March 1, 1988.

Issued this 10th day of March, 1988, in the City of Little Rock, Arkansas.

/s/ Mahlon Martin
Mahlon Martin, Director
Department of Finance and
Administration

/s/ Jim C. Pledger
Jim C. Pledger
Commissioner of Revenues

PLAINTIFF'S EXHIBIT 13
(5-9-88)
[886]

DEPARTMENT OF FINANCE AND ADMINISTRATION
REVENUE POLICY STATEMENT 1988-3

In Revenue Policy Statement 1988-1 the Revenue Division stated that it would no longer assess Arkansas Sales or Use Tax on subscription sales of certain publications and that taxpayers will no longer be required to report tax on purchases of these publications. Since that policy statement was issued there has been some concern among taxpayers as

to what constitutes a subscription sale. The purpose of this policy statement is to clarify the meaning of subscription sales for all taxpayers. Arkansas Sales Tax Regulation No. GR-48(A)(VI) states:

> "The term "regular subscription" means the purchase by advance payment of a specified number of issues of a publication over a certain period of time, and delivered to the subscriber by mail or otherwise."

In order to come within the meaning of Revenue Policy Statement 1988-1 the subscription must meet the requirements of the above definition.

Issued this 30th day of March, 1988, in the City of Little Rock, Arkansas.

/s/ Mahlon Martin
Mahlon Martin, Director
Department of Finance and
Administration

/s/ Jim C. Pledger
Jim C. Pledger
Commissioner of Revenues

[Opinion of Pulaski County Chancery Court]

Printed as Appendix C, Petition for Certiorari Docket No. 90-29, pg. C-1

Printed as Appendix D, Petition for Certiorari, Docket No. 90-38, pg. 11a

[Order and Judgment of Pulaski County Chancery Court]

Printed as Appendix B, Petition for Certiorari, Docket No. 90-29, pg. B-1

Printed as Appendix C, Petition for Certiorari, Docket No. 90-38, pg. 9a

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
(caption omitted in printing)

ORDER
(Filed May 9, 1988)
(Filed May 9, 1990)

On this 9th day of May, 1988 is presented to the court, the Motion To Intervene by the City of Fayetteville, Arkansas. From said motion, and a review of the complete case file, the court finds:

1. That applicant's defense and the main action have common questions of law and fact.

2. The intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

IT IS, THEREFORE, ORDERED that the City of Fayetteville, Arkansas be permitted to intervene in this action.

/s/ Lee A. Munson
Chancellor

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION
(caption omitted in printing)

ORDER
(Filed March 21, 1989)

On the 17th day of March, 1989, a hearing was held to consider the plaintiffs' "Motion For Stay of Order Rescinding

Preliminary Injunction, Or, In The Alternative, For Modification Of That Order" filed on March 14, 1989 and the "Supplement" to said Motion filed on March 15, 1989. Present at the hearing were Mr. Eugene Sayre, attorney for plaintiffs; Mr. Joe Morphew, attorney for defendant Commissioner of Revenues; and Mr. Robert Parker, attorney for the City of Benton, Arkansas. From the Motion and Supplement thereto, argument of counsel, and all other matters presented, THE COURT FINDS:

1. On March 10, 1989, the Opinion of this Court was entered, wherein a final decision on the merits was rendered in favor of defendants herein. Pursuant to that Opinion and ARCP Rule 65, this Court dismissed the complaint of plaintiffs and dissolved the Preliminary Injunction entered herein on August 28, 1987, thereby releasing unto defendants all funds previously required to be deposited into an interest-bearing escrow account and removing all requirements and restrictions previously imposed against defendants.

2. The Court having rendered its final determination of the issues raised in this case after all such issues had been fully presented, briefed and argued, there exists no good cause for reinstating any provision of the Court's Preliminary Injunction entered on August 28, 1987, or modifying or rescinding any part of its Order And Judgment entered on March 13, 1989, there being an adequate remedy for plaintiffs if they were to ultimately succeed on appeal, and there being no probability or likelihood of plaintiffs' success on the merits since this Court has finally decided the merits of the case in favor of defendants based upon the state of the law announced by the Courts of this state and nation.

3. The Opinion entered by this Court on March 10, 1989 and the Order And Judgment entered by this Court on March 13, 1989 are final and dispose of all matters of fact and law herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion For Stay Of Order Rescinding Preliminary Injunction, Or, In The Alternative, For Modification Of That Order and the Supplement thereto are denied in their entirety and that plaintiffs are not entitled to any relief upon the claims presented to this Court.

ENTERED this 21st day of March, 1989.

Signed for 1st Div. /s/ Ellen B. Brantley
Chancellor

IN THE CHANCERY COURT
OF PULASKI COUNTY
FIRST DIVISION
(caption omitted in printing)

SUPPLEMENTAL NOTICE OF APPEAL
(Filed March 23, 1990)

Come now the representatives of the Plaintiff-class, by and through their undersigned solicitor, and file this Supplemental Notice of Appeal from: (1) the Order and Judgment entered herein on March 13, 1989, by the Honorable Lee A. Munson (which Order rescinded the Preliminary Injunction that was entered herein on August 28, 1987), and (2) the Order entered herein on March 21, 1989, denying the Plaintiffs' Motion for Stay or Modification of the Order of March 13, 1989, Rescinding the Preliminary Injunction entered on August 28, 1987. The Plaintiffs seek an expedited appeal on this limited issue (prior to the full appeal on the merits) in an attempt to secure a stay or modification of the Chancellor's Order of March 13, 1989, so as to avoid the irreparable harm the members of the Plaintiff-class will suffer if all or part of the requirements of the Preliminary Injunction of August 28, 1987, are not reinstated immediately, pending the full appeal in this case.

Supplemental Designation of Record

The representatives of the Plaintiff-class originally designated the entire record as the Record on Appeal in its Notice of Appeal filed herein on March 14, 1989. Since then the Chancellor in the trial court has denied the Motion of the Plaintiff-class to stay or modify the effect of the Court's Order of March 13, 1989, rescinding the Preliminary Injunction of August 28, 1987, and the Plaintiff-class has decided to seek an expedited and limited appeal to the Arkansas Supreme Court on the issues surrounding the release of the "escrow account" and the "special handling system" for Sales Tax Reports reflecting collections of the state and local Sales Taxes imposed by Act 188 of 1987 that were required by the Preliminary Injunction entered herein on August 28, 1987, which requirements were rescinded by the trial court's Order of March 13, 1989, pending the preparation of the record for the full appeal. Therefore, for purposes of both (1) this expedited and limited appeal to seek a stay or modification of the dissolution of the Preliminary Injunction previously entered and (2) the full appeal, the representatives of the Plaintiff-class modify their original designation of record and do hereby designate the following parts of the overall record, as the designated Record on Appeal:

* * *

Transcript Ordered

The solicitor for the Plaintiff-class hereby states that he has contacted the Court Reporter and has ordered preparation of the record and the transcript of all testimony given at any hearing or at the trial in this case, as required by the provisions of Rule 3(e) of the Arkansas Rules of Appellate Procedure.

Issues on Expedited Appeal

The statement of the points on which the representatives of the Plaintiff-class intend to rely upon their expedited and limited appeal, as required by the provisions of Rule 3(g) of the Arkansas Rules of Appellate Procedure, are as follows:

1. Should this Court stay and trial court's Order of March 13, 1989, rescinding the requirements of the Preliminary Injunction entered herein on August 28, 1987?

2. If the Supreme Court does not reinstate in full the requirements of the Preliminary Injunction entered herein on August 28, 1987, should the Supreme Court modify the trial court's Order of March 13, 1989, so as to reinstate the requirements of the Preliminary Injunction with regard: (1) to the escrowing of the local Sales Taxes imposed by Act 188 of 1987, and/or (2) to reinstating the "special handling system" for state and local Sales Taxes imposed by Act 188 of 1987, and to extend the reporting requirements of this "special handling system" to the State Treasurer, as well as the Commissioner of Revenues?

3. Should either of the actions requested by the Plaintiff-class in paragraphs 2 and 3, above, be taken with the waiver of any requirement of the posting of a bond on behalf of the Plaintiff-class?

Issues on Full Appeal

The statement of the points on which the representatives of the Plaintiff-class intend to rely upon for their full appeal, as required by the provisions of Rule 3(g) of the Arkansas Rules of Appellate Procedure, are as follows:

4. Did the enactment of Act 188 of 1987 cause the statutory scheme for imposing state and local Sales Taxes in Arkansas to discriminatorily impose such Sales Taxes on

charges made for cable television services, so as to single out both cable television system operators and cable television system subscribers for taxation (as opposed to other entities involved in the mass communications medium in Arkansas), so that such action violates the rights of free speech and free press guaranteed to the members of the Plaintiff-class by the First Amendment to the United States Constitution?

5. Do the provisions of Act 188 of 1987 cause the state and local Sales Taxes of the State of Arkansas to be discriminatorily imposed upon charges for cable television services in violation of the "equal protection" provisions of the federal and state constitutions?

6. Do the provisions of Act 188 of 1987, which impose the state and local Sales Taxes in the State of Arkansas, cause such taxes to be discriminatorily imposed upon charges for cable television services, so as to deny the members of the Plaintiff-class the "equality" of taxation guaranteed to them by the privileges and immunities provisions of Art. 2 § 18 of the Arkansas State Constitution?

7. Are the discriminatory state and local Sales Taxes imposed upon cable television service by the provisions of Act 188 of 1987 prohibited by the provisions of the Cable Communications Policy Act of 1984, so that such legislative action by the State of Arkansas violates the provisions of the Supremacy Clause of the United States Constitution?

8. Is the proper remedy in this case for the Court to strike and refund the state and local Sales Taxes imposed by Act 188 of 1987, if the Court finds such taxes are unconstitutional, rather than judicially extending the state and local Sales Taxes imposed in the State of Arkansas to charges made for "excluded" or "exempted" mediums of mass communication that have similar First Amendment protected rights of free speech and free press?

Respectfully submitted,

/s/ Eugene G. Sayre

Eugene G. Sayre
JACK, LYON & JONES, P.A.
3400 TCBY Tower
Little Rock, Arkansas 72201
(501) 375-1122

SOLICITOR FOR PLAINTIFFS

(CERTIFICATE OF SERVICE omitted in printing)

[Opinion, Arkansas Supreme Court]

Printed as Appendix A, Petition for Certiorari, Docket No. 90-29, pg. A-1

Printed as Appendix B, Petition for Certiorari, Docket No. 90-38, pg. 3a

[Order of Arkansas Supreme Court denying Petitions for Rehearing]

Printed as Appendix D, Petition for Certiorari, Docket No. 90-29, pg. D-1

Printed as Appendix A, Petition for Certiorari, Docket No. 90-38, pg. 1a

IN THE SUPREME COURT OF ARKANSAS

DANIEL L. MEDLOCK, et. al. APPELLANTS

VS. NO. 89-89

JAMES C. PLEDGER, et. al. APPELLEES

CITY OF FAYETTEVILLE, ARKANSAS INTERVENOR

PETITION FOR REHEARING
(Filed March 16, 1990)

Come now the Appellees, James C. Pledger, Commissioner of Revenues; Jimmie Lou Fisher, Treasurer of the State of Arkansas; Donald Venhaus, County Judge, Pulaski County, Arkansas; Patricia Tedford, Treasurer, Pulaski County, Arkansas; and Pulaski County, Arkansas; and Pulaski County, Arkansas, by and through their respective counsel, who respectfully petition the Court to rehear the issues in this case because the opinion contains the following error of law:

The opinion found that the Arkansas Gross Receipts Tax on cable television service was discriminatory and thus in violation of the First Amendment to the U.S. Constitution because the tax was not applied to the charges for the unscrambling of satellite television programming, which the Court found to be a similar service. However, this finding of discrimination was made without taking into consideration the argument of Appellees, based on facts contained in the record, that Appellees had no previous knowledge that the services were similar, and thus had no discriminatory intent.

WHEREFORE, premises considered, Appellees pray that the Court rehear this cause.

Respectfully submitted,

JAMES C. PLEDGER, APPELLEE

BY: /s/ William E. Keadle
WILLIAM E. KEADLE
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
Attorney for Appellee Pledger

JIMMIE LOU FISHER,
APPELLEE

BY: /s/ Frank J. Wills, III
FRANK J. WILLS, III
Assistant Attorney General
200 Tower Building
Fourth and Center Streets
Little Rock, AR 72201

DONALD VENHAUS,
PATRICIA TEDFORD,
PULASKI COUNTY, ARKANSAS

BY: /s/ Larry D. Vaught
LARRY D. VAUGHT
Pulaski County Attorney
Room 217, Wallace Building
Little Rock, AR 72201

CERTIFICATE OF MERIT

The undersigned counsel for Appellees certify that they believe there is merit to this petition for rehearing and that it is not filed for the purpose of delay.

/s/ William E. Keadle
WILLIAM E. KEADLE

/s/ Frank J. Wills
FRANK J. WILLS, III

/s/ Larry D. Vaught
LARRY D. VAUGHT

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Come now the Appellees, and for their Brief in Support of the Petition for Rehearing filed herein, state as follows:

At Page 10 of the Argument portion of Appellees' Brief, it is stated:

> "... As far as satellite television is concerned, it was not until the trial in the Court below that any of the Appellees, the General Assembly or, we submit, any lay person had ever heard of the collection of charges for satellite television service. It is still not clear how that occurs, but apparently there are limited circumstances where charges are made to satellite dish owners for the ability to receive certain transmissions . . . ."

This argument is supported at Page 103 of Appellants' Abstract, where the testimony of Gail Price, then Manager of the Sales and Use Tax Section of the Arkansas Department of Finance and Administration, is abstracted as follows:

> "About 8 or 10 years ago, I participated in meetings at the Revenue Department concerning the taxation of cable television services and it was considered in that framework to be a taxable service already within the law as it existed (R. 1008-1009). The Revenue Division waited for the legislature to change the Sales Tax law to add cable television as a designated taxable service, because we just considered it another service that was taxable and we decided to wait so that it would be clear that it would be included within the statute. There was never any indication or statement made that cable television was gong to be singled out for special tax treatment, it was just another service they were trying to make taxable." (TR 1010)

Consequently, as is pointed out by Appellants in their brief, the General Assembly acted in the next legislative session after the trial and adopted Act 769 of 1989, which extended the state and local sales tax to charges made for "scrambled" satellite broadcast television subscription services sold to an Arkansas citizen, further evidencing a lack of prior knowledge that a charge was collected with regard to satellite television service.

In this case, as in many, the constitutionality of an Act depends on the existence or non-existence of certain facts. If, for instance, a gross receipt producing satellite television service did not exist, then the Court would find Act 188 of 1987 constitutional since cable television has been found to be distinguishable from the print media. Act 188 was deemed unconstitutional only because satellite television is similarly situated to cable television in that both deliver essentially the same message and both have gross receipts for a sale of the service. The only difference between Act 188 of 1987 and Act 769 of 1989, which the Court found constitutional, is the added element of unscrambled satellite television.

The record indicates, and the Appellees argued in both the brief and oral argument, that the legislature was not aware of a gross receipt producing satellite television service when Act 188 was passed. When legislative findings of fact are relevant to a judicial determination, such findings are entitled to due respect. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe such facts to be established. *Re: Yun Quong*, 195 Cal. 508, 114 P. 835.

Cable and satellite television are rapidly growing and changing industries. The testimony of Appellants' own witnesses indicate a great deal of litigation over cable television in the last 15 years (R. 707-708). Cable service of a

general nature in Pulaski County was less than 10 years old when this lawsuit was filed. It is certainly not unheard of for the government and the legislature to lag behind in developing regulation and taxation of new and rapidly developing industries. The legislature passed Act 188 of 1987 in reaction to the "new" cable television industry to collect a tax on a definable service. When the State "discovered" a gross receipt producing satellite television industry through testimony in this case, Act 760 of 1989 was passed. Surely the Court cannot expect the legislature to anticipate new industries before they are known to exist.

At no place in the Court's opinion issued herein is any statement contained which would show that Appellees' argument in this regard was considered. It is clear from the record and the parties' briefs that the General Asembly acted at the earliest opportunity to correct what was suggested to be, but at the time neither proven to be, nor now admitted by Appellees to be, a difference in the tax treatment of two similar services, cable television service and satellite service.

It might be argued that lack of discriminatory intent on the part of the General Assembly should not be considered relevant as long as the resulting legislation has a discriminatory effect. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 421, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), the U.S. Supreme Court states:

> "Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive . . . This is because selective taxation of the press - either singling out the press as a whole or targeting individual members of the press - poses a particular danger of abuse by the State." (95 L.Ed.2d at 219)

However, the issue argued in this Petition goes beyond merely whether the General Assembly had a discriminatory intent. Again, it is submitted that the relevant issue for

purposes of this Petition is whether there was knowledge by the General Assembly that another similar class of individuals to the class of taxpayers affected even existed at the time the Act was enacted.

Without giving consideration to the fact that the General Assembly can only enact legislation with regard to what is known, the Court's opinion places an impossible standard to follow in enacting non-discr minatory taxation legislation. This decision would require the General Assembly to be clairvoyant with regard to the ever-advancing technology and competition in this and other scientific fields, so that such legislation will not be found in the future to be discriminatory as to classes of taxpayers which are suddenly placed in a situation which makes a previously dissimilar class of taxpayers similar.

For the above reasons, Appellees' Petition for Rehearing should be granted.

Respectfully submitted,

JAMES C. PLEDGER,
APPELLEE

BY: WILLIAM E. KEADLE
Revenue Legal Counsel

JIMMIE LOU FISHER,
APPELLEE

BY: FRANK J. WILLS, III
Assistant Attorney General

DONALD VENHAUS,
PATRICIA TEDFORD,
PULASKI COUNTY, ARKANSAS

BY: LARRY D. VAUGHT
Pulaski County Attorney

BY: /s/ William E. Keadle
WILLIAM E. KEADLE

(CERTIFICATE OF SERVICE omitted in printing)

IN THE SUPREME COURT OF ARKANSAS

DANIEL L. MEDLOCK, et. al. — APPELLANTS

VS. — NO. 89-89

JAMES C. PLEDGER, Commissioner of Revenues; et. al. — APPELLEES

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

APPELLANTS' PETITION FOR REHEARING
(Filed March 19, 1990)

Come now the representatives of the Appellant-class of taxpayers and cable television operators, and hereby file their Petition for Rehearing (in brief form), in accordance with the provisions of Rule 20 of the Rules of the Arkansas Supreme Court, requesting the Court (1) to modify the Court's opinion of February 28, 1990, so as not to foreclose the Appellants from an opportunity for an evidentiary challenge to the provisions of Act 769 of 1989, and (2) to reconsider its very narrow comparison of similarly situated businesses in the mass communications media for purposes of applying the First Amendment rationale decreed by the United States Supreme Court.

I. THIS COURT'S OPINION SHOULD BE MODIFIED SO AS NOT TO FORECLOSE THE APPEL-

LANTS' RIGHT TO EVIDENTIARILY CHALLENGE THE PROVISIONS OF ACT 769 OF 1989 (WHICH AMENDED ACT 188 OF 1987), EITHER ON REMAND IN THIS CASE, OR IN A SEPARATE ACTION.

The Appellants respectfully request the members of this Court to modify the opinion entered in this case on February 28, 1990, so as not to approve the amendment of Act 188 of 1987 by the adoption of Act 769 of 1989, without allowing the Appellants an opportunity to evidentiarily establish the constitutional infirmities of Act 769 of 1989. On page 1 of the Court's opinion, it is stated that the Sales Tax was illegal, but "its illegality has been cured." However, the Court then notes on pages 3 and 6 of its Opinion that Act 769 of 1989 did not become law until after the Chancellor's ruling in the trial court, and, therefore, Act 769 of 1989 was *not* before the trial court in this case.

The Appellants submit that, because of the very fact that Act 769 was not before the trial court, this Court's stamp of approval upon the constitutionality of Act 769 is a premature decision that has been made without any basis in the evidentiary record to support such a holding, and such holding may give rise to a claim of "collateral estoppel" or "res judicata" by the State to any attempt of the Appellants to evidentiarily challenge the constitutionality of Act 769 of 1989 in the future.

As noted in the Appellants' original brief,[1] the adoption of the language used in Act 769 of 1989 may have lessened the unconstitutional discrimination regarding the imposition of a state excise tax upon charges for these similar services, but the Appellants should not be foreclosed from the opportunity to evidentiarily establish that the enactment of Act 769 of 1989 did not eliminate this unconstitutionally discriminatory application of the state's excise taxes upon

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[1]Appellants' Opening Brief, pp. 161-162, ftnt. 20.

charges made for providing these similar electronic programming services to Arkansas subscribers.

Arkansas' Sales Tax is an "excise" tax upon sales made within the borders of the State of Arkansas. Arkansas' Use Tax is a compensating "excise" tax that is imposed upon the use, storage or consumption of property purchased outside of the boundaries of the State of Arkansas but used, stored or consumed within the state. Arkansas' Sales Tax may not be imposed upon a sale that is completed in another taxing jurisdiction, especially where the sale is one made in interstate commerce.[2]

Since Act 769 of 1989 did not even come into existence until March 21, 1989,[3] the Appellants had no opportunity to introduce evidence in the trial court of the continued lack of the imposition of an Arkansas "excise" tax upon charges for "scrambled" satellite television programming services provided to Arkansas consumers by out-of-state based satellite broadcast services. In the vast majority of instances, Arkansas subscribers to "scrambled" satellite television broadcast services secure such services by calling a toll-free "800" number of an out-of-state located "scrambled" satellite television broadcast provider, and then the Arkansas subscriber sends the payment for such "scrambled" satellite broadcasting services directly to the out-of-state based provider. Therefore, the sale in such a situation is completed in interstate commerce at the place where the Arkansas

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[2]See, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), affirming, 205 Ark. 780, 171 S.W.2d 102 (1943); and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

[3]Act 769 of 1989 was signed into law eleven days after the entry of the Opinion by the Chancellor in the trial court below, and some ten months after the evidentiary record was closed at the trial of this case in May of 1989.

subscriber's check is received and negotiated, e.g. Dallas, Texas; Atlanta, Georgia; New York City, etc.[4]

This Court specifically noted in its Opinion that Paul Gardner had testified that Community Communications Company's sale of "scrambled" satellite television services to Arkansas subscribers was not taxable under the provisions of Act 188 of 1987. The amendment to Act 188 of 1987 by the adoption of Act 769 of 1989 merely extended Arkansas' Sales Taxes to sales where local cable operators act as "collecting agents" for the out-of-state "scrambled" satellite television service providers. The Appellants submit that they should be given the opportunity to evidentiarily establish that such situations are far in the minority, and that in the majority of instances the Arkansas subscribers' payments are being made directly to an out-of-state "scrambled" satellite service provider.[5] This Court must note that Arkansas' Compensating Tax Act (Ark. Code Ann. § § 26-53-101—26-53-131) does not impose a Compensating (Use) Tax (i.e. "excise" tax) upon *any* "services" that are provided to Arkansas customers by out-of-state providers.[6]

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[4]See the Affidavits of Diane F. Davis, an Arkansas "scrambled" satellite television broadcast service subscriber, and Jeff Kupsky of Turner Broadcasting Systems, Inc. that are attached as Appendices I and II, respectively. These affidavits are submitted solely for the limited purpose of establishing to the members of this Court that their approval of the constitutionality of Act 769 of 1989 is premature and an evidentiary question exists as to whether or not the adoption of Act 769 of 1989 has cured the constitutional infirmity of the imposition of Arkansas' "excise" taxes upon the charges for these similarly situated television programming services. The Appellants submit that they should not be estopped from having the opportunity to establish an evidentiary record of such facts on remand in this case or in a separate action.

[5]See the Affidavits of Paul Q. Gardner, Appendix III, and Diane F. Davis, Appendix I, attached hereto.

[6] The Appellants note that Justice Marshall, in his opinion in the case of *Goldberg v. Sweet*, 109 S. Ct. 582, 589-590 (1989) specifically held, in questioning whether a state had the ability to impose a tax for the privilege of receiving an electronic transmission, that:

> "We also doubt that the termination of an interstate telephone call, by itself, provides a substantial enough nexus for a state to tax a call."

The General Assembly's imposition of Arkansas' Sales Taxes upon charges for both "scrambled" satellite and cable television services does not cure the constitutional infirmity of Arkansas' statutory scheme of "excise" tax imposition, especially when the Arkansas subscriber to "scrambled" satellite services can avoid the state and local Sales Taxes entirely, merely by choosing to pay for these services directly to the out-of-state provider, i.e. a method of payment that is not even subject to Arkansas' Sales Tax.

The Appellants have also alleged an equal protection clause violation because of Arkansas' statutory scheme of "excise" taxation of these similarly situated television programming services. This Court has already found that such services affect a "fundamental" constitutional right, i.e. "free speech" and "free press," both of which are protected by the First Amendment. Therefore, under the decisions of the United States Supreme Coiurt in both *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *United States v. O'Brien*, 391 U.S. 367 (1968), the Appellants submit that the burden of proof should be placed upon the State of Arkansas to show a compelling reason why its statutory scheme of Sales Tax and Use Tax imposition can pass constitutional muster where it allows the vast majority of the charges for "scrambled" satellite television broadcast services to Arkansas consumers to be made "excise" tax free, while charges for virtually the identical cable television programming services or charges for some satellite services (where cable system operators act as "collecting agents" for an out-of-state based "scrambled"

satellite television subscription service providers) are subjected to the state's "excise" taxes.[7]

Therefore, the Appellants submit that this Court's Opinion of February 28, 1990, must be modified so as not to prematurely rule upon the constitutionality of Act 769 of 1989. The Appellants must be allowed to present evidence, on remand in this case or in a separate action, that such legislative action has not cured the constitutional infirmity which this Court has found exists in its review of Arkansas' statutory scheme for imposing the state's "excise" taxes upon charges for these similarly situated television programming services.

II. THE COURT SHOULD RECONSIDER ITS NARROW COMPARISON OF SIMILARLY SITUATED TAXABLE ENTITIES FOR FIRST AMENDMENT PROTECTION COMPARISON PURPOSES, SO AS TO GIVE A BROADER AND MORE COMPREHENSIVE APPLICATION OF THESE FIRST AMENDMENT PROTECTED RIGHTS IN CHALLENGES TO STATE TAXES AS HAVE THE APPELLATE COURTS OF ARKANSAS' SISTER STATES.

In its Opinion of February 28, 1990, this Court has made a very narrow comparison of what are "similarly situated"

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[7]The Appellants submit that the Revenue Division of the Arkansas Department of Finance and Administration has already recognized this constitutional infirmity for First Amendment protected businesses operating in Arkansas. After the decision by the United States Supreme Court in *Arkansas Writer's Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987), and the General Assembly's refusal (on two occasions) to repeal the exemption questioned in that case (PX 7, A. 74-75, R. 835-837 and A. 132, R. 649-652), the Revenue Division issued Revenue Policy Statements 1988-1 and 1988-3 (PX 12 and PX 13, A. 105-106, R. 1016) that administratively recognized that Arkansas could not constitutionally impose a Use Tax on out-of-state published magazines sold by subscription, when no in-state published magazines sold by subscription were subjected to the state's Sales Tax.

businesses that enjoy the First Amendment protection of "free speech" and "free press" for purposes of determining whether or not Arkansas' state and local Sales Taxes have been "discriminatorily" imposed upon the charges for such services. This Court specifically noted (page 6) that the Appellants have cited no United States Supreme Court case that holds that the failure to tax the print and radio segments of the mass communications media the same violates the First Amendment guaranteed rights of "free speech" and "free press."

The Appellants do point out that no such question has ever been submitted to the Supreme Court, but that in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986), the Supreme Court has drawn a very close similarity between the First Amendment rights to be afforded cable television as compared to those of the print media. In that decision, Chief Justice Rehnquist held (106 S.Ct., at 2037-38):

> "We do think that the activities which Respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content.
>
> Thus, through original programming or by exercising editorial discretion over which station or programs to include in its repertoire, Respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted

> that cable operators exercised "a significant amount of editorial discretion regarding what their programming will include." . . . Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers . . . (Citations omitted)

In two recent opinions implementing the First Amendment rationale of the Supreme Court decision in *Minneapolis Star, supra*, both the highest appellate courts of the States of Oklahoma and New York have given a much broader interpretation of these First Amendment rights in instances in which the taxpayers have questioned the constitutionality of state taxes than has this Court in this appeal.[8] The evidentiary record in this case well establishes the similarities between the "print" segment of the mass communications media and the "cable television" segment of the same mass communications media.[9]

The *Dow Jones* and *McGraw-Hill* decisions in Oklahoma and New York were rendered after the oral argument in this case on January 29, 1990. Therefore, the Appellants submit that this Court should abandon the very narrow test it has adopted for comparing similarly situated First Amendment protected businesses and, instead, should adopt guidelines that apply much broader utilization of the Supreme Court's rationale in the *Minneapolis Star* decision when comparing

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[8]See the opinion of the Oklahoma Supreme Court in *Dow Jones & Co. v. Oklahoma Tax Commission*, ____ P.2d ____ (1990), Vol. 61 Okla. B.J. 253 (1990) and the decision of the New York Court of Appeals in *McGraw-Hill, Inc. v. State Tax Commission*, ____ N.E.2d ____ (1990) affirming the Appellate Division of the Supreme Court at 541 N.Y.S.2d 253 (Ap. D. 3 Dept., 1989). In the *McGraw-Hill* case, the New York court specifically found that the differential in the taxation of print and electronic segments of the mass communications media brought the *O'Brien* test into play, and shifted the burden of proof to the state to show what "compelling governmental interest" was served by this differential taxation.

[9]See the testimony of Messrs. Blount, Tucker and Deyo at A. 56-57, 63, 67, 82-84, 97-99.

the taxation of charges for the print media segment and the cable television segment of the mass communications media. Thus, on re-examination, the Appellants submit that this Court should adopt a broader rationale of the Supreme Court's *Minneapolis Star* decision, and find that cable television and magazines and newspapers are similarly situated and must be subjected to Sales Taxes in the State of Arkansas in the same manner.

CERTIFICATE

The undersigned counsel for the Appellants certifies that he believes there is merit to this Petition for Rehearing and that it has not been filed for the purpose of delay.

Respectfully submitted,

/s/ Eugene G. Sayre

Eugene G. Sayre, No. 75111
JACK, LYON & JONES, P.A.
3400 TCBY Tower
Little Rock, AR 72201
(501) 375-1122

(Appendices I, II and III Stricken by Order of Arkansas Supreme Court)

[Order of Arkansas Supreme Court denying Petitions for Rehearing]

Printed as Appendix D, Petition for Certiorari, Docket No. 90-29, pg. D-1 .....

Printed as Appendix A, Petition for Certiorari, Docket No. 90-38, pg. 1a. .....

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1990

Mr. William E. Keadle
7th and Wolfe Streets
P.O. Box 1272-L
Little Rock, AR 72203

Mr. Eugene G. Sayre
3400 TCBY Tower
Little Rock, Arkansas 72201

Re: James C. Pledger, Commissioner of Revenues of Arkansas
v. Daniel L. Medlock, et al.
No. 90-29
Daniel L. Medlock, et al.
v. James C. Pledger, Commissioner of Revenues, et al.
No. 90-38

Dear Mr. Keadle and Mr. Sayre:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk